IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1517/11//7/22

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Wednesday 14 February – Thursday 28 March 2024

Before:

The Honourable Sir Marcus Smith (President)
Ben Tidswell
Professor Michael Waterson

(Sitting as a Tribunal in England and Wales)

MERCHANT INTERCHANGE FEE UMBRELLA PROCEEDINGS

TRIAL 1

A P P E A R A N C E S

Kieron Beal KC, Philip Woolfe, Oliver Jackson & Antonia Fitzpatrick (instructed by Stephenson Harwood LLP and Scott+Scott UK LLP) on behalf of the Stephenson Harwood LLP and Scott+Scott UK LLP Claimants

Brian Kennelly KC, Jason Pobjoy, Isabel Buchanan & Ava Mayer (Instructed by Linklaters LLP and Milbank LLP) on behalf of Visa

Sonia Tolaney KC, Matthew Cook KC, Owain Draper & Veena Srirangam (Instructed by Jones Day) on behalf of Mastercard

Friday, 22 March 2024

Closing submissions by MR BEAL

(10.00 am)

THE PRESIDENT: Mr Beal, good morning.

MR BEAL: Good morning, sir. I understand the Tribunal has already had a very busy morning so what I am going to try and do today is to make life as straightforward as possible.

The endeavour behind that is not to go through the 310 pages of written closing that we have exchanged with the other parties at 9.30 this morning, nor indeed have I had a chance to look at their submissions of equal length before I address you. What I have done as I foreshadowed is prepare an aide memoire which tries to cut through some of the issues on a bigger picture basis, if I could pass that up, please, thank you very much.

My trusted assistant this morning is now a learned King's Counsel; may I now please delight in welcoming him to the front row officially.

THE PRESIDENT: Congratulations, Mr Woolfe, we have already said so, but you are very welcome.

MR WOOLFE: Thank you, sir.

MR BEAL: The first document I hope the Tribunal has is aide memoire; a modest 42 pages. Then there is a chronology

which I hope the Tribunal may find useful. It is not every document but it is the key documents which are now in chronological order, marked for confidentiality in both cases.

So starting off, if I may, please, with an explanation of what the aide memoire is intended to do: it is intended to accompany the written closing submissions that have been filed this morning. I am not sure if they are yet on Opus but I hope that a hard copy has found its way to the Tribunal.

THE PRESIDENT: No, I do not have a chronology as yet.

MR BEAL: I thought -- I handed up -- it was part of the same thing. There were two documents in the same bundle.

THE PRESIDENT: Right.

MR BEAL: There should be a document headed "Aide memoire" and a separate document headed "Chronology".

THE PRESIDENT: Yes, we now have both, yes.

MR BEAL: I am sorry I did not have time to put treasury tags on them both.

THE PRESIDENT: We are now complete.

MR BEAL: You are now replete, thank you.

So the aide memoire and the chronology and the written closings I am hoping will be posted to Opus and I will get a message telling me when that has been done.

I cannot conceivably go through all of that today so what I am proposing to do is just pick out the key themes as I see them, that are in dispute in an effort to see the wood for the trees and the Tribunal will be able to judge at the end of my closing submissions whether I have achieved in doing that or not.

What I am proposing to do with your permission is to address in order some observations on the background to the scheme and the competitive issues, then to focus on the key principal legal issues that exist between the parties, to make some observations on the factual evidence, some brief observations on the expert evidence and then to give the Tribunal my answers to each of the issues, seriatim.

At paragraph 4, page 2 of the aide memoire, I have set out a neat summary that was given by Mr Dryden in his evidence to the Tribunal. Please could I invite the Tribunal to read that paragraph. It encapsulates, we say, the essential thrust of the issues for the Tribunal in this trial.

THE PRESIDENT: Yes.

MR BEAL: We do say there was something of a rearguard action by Mr Holt to try and suggest Visa did not have market power. With the greatest of respect, that does not withstand scrutiny. First of all, we have got

valuable insights in the various payment sector regulator reports we have been through and traversed substantially. We have also got some market share analysis both in the UK, Ireland and globally from the RBR reports again that I went through with a number of witnesses and both experts. We have got evidence from the claimants' and the defendants' witnesses as to the extent of market power that Visa and Mastercard each enjoy and we have seen repeatedly again, for which I apologise in part because I had to go through with the witnesses the same regulatory decisions every time they said something that was inconsistent with them, we have got those repeat regulatory interventions on a global basis since the mid-2000s.

There have been repeat private enforcement claims brought and we know from everyday experience, certainly since Covid, how crucial payment cards now are in the modern economy.

Whereas 25 years ago, one can remember maybe 30, 40 years ago, we can remember the adverts from Access and the flexible friend round the pool with a fat wallet lounging in the pool and travellers' cheques who had to nip off to get changed, that was the joke; we remember those adverts and it was seen as something of a quaint luxury to have a payment card that was capable of being

used worldwide. Now you would not get very far if you suggested that you could not use the cards that you have in your wallet or your purse on holiday when you go to France, Ireland, Spain or further afield.

So things have moved on and the ubiquity of payment cards and indeed the Visa and Mastercard systems is incontestable.

But that very resilient duopoly that we have seen maintained despite the repeated interventions at regulatory and judicial level should, we respectfully suggest, give pause for concern -- cause for concern, sorry, pause for thought perhaps. There has not been any significant competitive entry despite the various price caps that have been put in place and despite the various interventions that have taken place. Both schemes have flourished and we see in the PSR reports starting in November 2021 for the UK figures for consumer payment cards and I think commercial payment cards the overall figure was something approaching 98%. That then increased by the time of the interim report in December 2023 to 99% between (inaudible).

So it is an extraordinary position we face where on any view those schemes do have very substantial market power between them and that is so even though they each say they are fighting tooth and nail against each other.

That accumulated power is associated with the merchant predicament as we heard from Mr Dryden, again I have set out in paragraph 6 quite a lengthy extract from his cross-examination but he did have, if I may say so, a moment of supreme clarity when asked about unnatural or artificial positions versus what was happening with transactions and he said:

"I am not sure economists really distinguish between the natural and the unnatural. We distinguish situations of market power and no market power, of efficiency and inefficiency, of market distortion or no market distortion."

He went on then to explain what that meant in context.

So the real concern as he tried to explain was features of the market meant that it was -- the MSC was prone to be too high which would not necessarily equate with an efficient level of pricing in the market.

That clarity is really to dissect what the key issue is here. You have two schemes who operate in a similar way, driving up prices on the issuing side of the market in a form of reverse competition and in a way that necessarily gets translated into higher MSCs for merchants and the reason they are higher, as we now know, is because the MIFs are simply a key component --

a substantial component -- of the MSC and that component is non-negotiable.

So I would like to start, if I may, in terms of looking at some documents with the Tribunal's own diagram, that is {RC-R/41/1}.

If I may say so, the clarity that this particular diagram brings is threefold: first of all it dispenses with the impression you can otherwise gain from the diagrams that are more rounded in shape with a dash across the middle like a lower case omicron in the Greek alphabet. It dispenses with that middle dash because in substance that was never a contractual link and therefore the, if I may say so, clarity of this particular diagram is to show that the only link between the acquirer and the issuer is the flow of funds; there is no actual underlying contractual relationship there.

Where are the contractual relationships? Well, that again is what this diagram shows. It shows cardholder and the customer, that is the underlying transaction. You will recall that Dr Niels sought valiantly to try and suggest payment schemes were an intermediary in that transaction. Well, that does not make much sense economically, in my respectful opinion, it certainly makes no sense legally to suggest that a payment method is operating as an agent for bringing two parties to

a transaction together. A cardholder presents a card payment in a shop because he or she wants to obtain goods or services in return and the merchant only takes that card payment because it is a promise of payment, it is a discharge of the contractual obligation to pay and that is the key thing from the shop's point of view, it wants to be paid. It does not care unduly how it is paid. You have heard evidence which we accept that most merchants want to be paid and therefore getting paid is in a sense more important than the means of payment up to a point.

But most merchants will therefore accept cash, cheques, payment cards, no doubt electronic payments in due course once the system is more finely calibrated and more prevalent but they do so notwithstanding that there are differences of cost associated with each of those different payment methods. So what matters for the merchant is getting paid, the merchant in order to receive payment cards and use that as a form of payment necessarily enters into an arrangement with the merchant acquirer because they cannot be dealing with these things on an individualised basis. What they do is they submit the end of day batch files to the merchant acquirer, be it Worldpay, Elavon or Barclaycard or any of the others. They submit those batch files, those

batch files get processed by the merchant acquirer, they get directed via the scheme. The scheme then performs clearing and net settlement. The scheme then tells the issuing bank what to pay and the issuing bank then discharges the obligation to pay by instructing its own bank or if necessary -- well, it will be its own bank, either directly or via the scheme, to pay the funds to the acquirer's bank and that is the transfer of funds, that is how it works.

Of course that necessarily requires that the acquirer has a contract with the scheme and the acquirer pays scheme fees for the privilege. The issuer has to have a contract with the scheme and again the issuer pays scheme fees for the privilege, and the issuer -- the final leg of the final journey is the issuer has the relationship with the cardholder and it chooses to issue the card to the cardholder precisely so that the cardholder can experience the benefit of being able to pay for things with a card rather than constantly in cash or using a cheque, which I accept is more cumbersome certainly in this day and age of contactless.

So we do say it is appropriate to start there, it is appropriate to look at those contractual relationships and to emphasise the need for rigour in identifying why the acquirer is having to transfer those funds to the

issuer. There is no underlying contractual relationship, there is no suggestion that they are directly contracting with each other, they are clearly not, they are both taking part in a scheme. Why is the scheme telling one to pay the other anything? It does not intrinsically make much sense and it is an oddity of this system that this interchange fee has persisted, notwithstanding what I would describe as the disaggregation of the issuer and acquirer market.

Now, the Tribunal is well aware that back in the day, no doubt when the system was first conceived, there was an obligation for all issuers to be acquirers and for all acquirers to be issuers, that was the rule that was then done away with in the early 2000s because of regulatory concerns about its impact.

But with the financial crash, one saw the disaggregation of the acquiring market so that large entities like NatWest as a condition of getting substantial financial subsidy from the government as a result of the financial crisis had to hive off certain activities, one of which was the acquiring service Streamline that became acquired by Worldpay and is now the Worldpay acquiring service. But it means that as a result in today's modern era, we have only two issuers that also have an acquiring service, one is Barclays

with Barclaycard and the other is Lloyds Bank TSB with the Lloyds Bank Cardnet.

But that does of course give a very different picture. Whereas back in the old days perhaps somewhat anachronistically one could conceive of these payment schemes being part of a club, they were a club of issuing and acquiring banks, the idea of issuing and acquiring banks collectively determining what the basis was for their mutual enterprise made somewhat more sense and one can see perhaps if they wanted to try and make sure that one side of the market that was predominantly issuers was not benefiting to the disadvantage of the other side of the fence that was predominantly acquirers, you would want to have some way of reconciling the scheme costs between those two different groups.

Once you have disaggregation at the acquirer stage, that motivation disappears and yet the interchange fee has been maintained and indeed we have seen in part it has increased certainly post Brexit.

Why? Why has it increased? Well, the overwhelming evidence before the Tribunal is that it has increased because the schemes perceive it to be in their interests to motivate issuers to issue as many cards to their scheme as possible. They want issuers to issue more

cards and to generate more transactions to go through the issuers -- that particular scheme in order to grow the scheme fees because it is the scheme fees that produce the profit for both Mastercard and Visa; that is where it gets its money predominantly.

So that is the motivation but of course the motivation for each scheme is necessarily the same, each of them want to increase issuers' fees and so that gives rise to the very problem we have on the issuing side which is the process of reverse competition drives up interchange fees when they are being used as an incentive or a subsidy to generate issuing activity or to subsidise issuing activity and of course it is the acquirer under the current scheme rules that pays for that, it pays for the interchange fee. The acquirer has no say in that, it is a non-negotiable price and the acquirer is necessarily, if it wants to recover its costs duty, bound to pass it on to the merchant and you have seen some references in some of the rules where IC plus plus pricing is required.

So this does lead to the merchant predicament, the merchant is in the position where it needs to accept payment cards because of their ubiquity and because in this day and age cardholders frankly expect to be able to pay with cards everywhere, indeed certainly

post-Covid it is quite common to be told you cannot pay in cash, you can only pay by card and that is a reversal of the situation in the mid-1980s, but it is where we are now.

So the acquirers have no choice, they have to pass on these fees, merchants have to pay them in the form of the MSC and we know since 2018 consumer debit and credit cards the merchant cannot surcharge the cardholder to pass the costs of that payment method back on to the cardholder.

So take somebody like Mr Bailey at Pendragon. He is selling expensive vehicles, say the vehicle is £100,000, he is faced with a series of payment options, he is told by a customer "I would like to use my expensive premium card because it contributes towards my holidays, I can buy holiday points with this particular card". He is in a position where he can of course try to encourage the customer to use, for example, an electronic payment service -- Faster Payments, for example -- but if the customer insists on using a credit card, then Pendragon will be paying on £100,000 sale £300 for the benefit of the customer having a substantial contribution towards its reward points to pay for the holiday.

If it is a debit card, £200.

If it is a premium credit card, which the schemes

suggest efficiently produce an incentive to provide more rewards for the customer buying an expensive vehicle, then it is £1,500 which is an extraordinary sum for a merchant to be paying for the benefit of somebody using a premium credit card and they cannot surcharge. That in a nutshell is the merchant predicament, that is the merchant predicament that was described by Mr Dryden.

So what this diagram, we say, at the top of page 4 of my note drills down into is the key issue, why is the scheme imposing a payment obligation on the acquirer when there is no freely negotiated supply of services by the issuer to the acquirer? I have put in square parentheses the fact that your diagram, sir, reminded me very much of the VAT analysis that one gets in cases like Redrow which involve a housebuilder paying for a survey from a surveyor. VAT is generated on the survey's professional fees. Who reclaims that VAT? Is it the person who buys the house that benefits from that survey or is it the housebuilder who has contracted with the surveyor to carry out the survey? So you have effectively third party consideration.

But that is not our case. This is not a case where somebody is providing consideration for somebody else's service. There is no direct service from the issuer to

the acquirer. On the contrary, the acquirer, as we know, bears its own costs of fraud detection, it carries its own credit risk and these are all costs that nowhere appear in the scheme's analysis of the benefit and burdens of using the scheme.

So this is not a third party payment situation. This is the imposition by the scheme of a subsidy from one side of a two-sided market to the other. It may well be at the article 101(3) stage that some justification can be found for that but we are not in the article 101(3) stage of this trial and, with the greatest of respect, the evidence that has been put forward is skeletal and insufficient for this Tribunal to reach a view on whether or not a justification could be found for that subsidy at this stage. It suffices for my purposes that it is a subsidy, that it leads to a non-negotiated price in the relevant market, the relevant market being the acquiring services market, and that therefore the essential facts as found by the Supreme Court in *Mastercard* still hold good across each of the MIFs.

Now, if we were to sort of cast one's mind to the future and think about how is this going to play out in due course, the only plausible explanation for that subsidy that one sees in the purple figure, the

interchange figure, the only explanation that might be given for it economically is that from Mr Dryden that somehow it is necessary to cure a positive externality by which the merchant benefits from the use of the payment card scheme without shouldering any of the costs.

Now, the problem therefore from the merchant or the acquirer perspective is: the merchant does indeed pay the acquirer so that the merchant is in fact paying for the use of this scheme, it pays scheme fees as one of the pluses in the IC plus plus pricing. The acquirer incurs its own costs; as I have said, it helps to prevent and detect fraud, it shoulders the credit risk when it is dealing with the charge-back process, and the acquirer pays the scheme through scheme fees. So it is not as if there is nothing being expended by way of costs on the acquirer leg of the two legs shown by this diagram.

On the contrary, there are costs, it is just that nowhere in the scheme's analysis have you seen them presented. Now, seen from the issuer or cardholder perspective, they of course each derive benefits from payment cards, so the cardholder has the obvious benefit that it is much easier to walk around with a payment card that is protected by security than £200 in notes in

cash, it is much less risky. The issuing bank derives a benefit from not having to constantly have people at brick and mortar premises doling out cash or giving out cash on Fridays. We have got cash machines for cash which is obviously a different market, but the payment card reduces the issuing bank's costs of having to handle cash, having to handle chequebooks and obviously the ability to process electronic transactions rather than cash transactions is a cost saving for the issuing bank. Now, we do not know any details of that because none of the evidence adduced by the schemes has gone to that issue.

There is also obviously a substantial benefit from the MIF revenue and what we do not have any evidence about is whether that MIF revenue is passed through to the cardholder or whether it is retained by the issuing bank as a nice to have windfall amount of revenue.

So again we have no visibility on anything that is in the ledger except the alleged costs that the issuing bank suffers which it is said that the MIF must go to pay.

So if, as the schemes are suggesting, they are inviting the Tribunal to conduct an article 101(3) lite analysis, the simple position is that this Tribunal does not have the tools to do the job because it does not

have the data and that has been, if I may say so, the repeat theme of some of the questions from the Tribunal to some of the witnesses over the last five weeks.

MR TIDSWELL: Can I pick you up on one point, a point about cash. Is that right that it is an issuer bank -- I think it is probably an acquiring bank issued the cash is it not?

MR BEAL: Well, acquiring bank issue -- well, it will be the merchant's bank that has to handle the cash from the customer but of course the issuing bank has to handle cash when it is dispensing cash to a customer for a customer to use but it is dealt with through the ATM network.

MR TIDSWELL: It makes a difference to the ATMs, I see, so there is a cost there associated with putting cash into circulation.

MR BEAL: Interestingly I do not think it is a point of detail we need. In the ATM network the MIF goes the other way. That is the subject of litigation I think that settled -- I think Mr Woolfe was in that, that settled in November, the ATM litigation.

MR TIDSWELL: Yes, I understand, I think --

MR BEAL: I am simply saying the issuing bank will necessarily have to stock cash machines, will have to have Securicor vans come and carry the cash to the

premises, to restock the cash machine and so on. In the old days one used to have queues going round the block on a Friday for banks to receive cash from merchants but at the same time there would be other people queuing to take cash out for the weekend and I am sure we all remember those days.

MR TIDSWELL: Thank you.

MR BEAL: So the essential point I am making is that the evidence you have received is focused on one aspect only, it does not give the complete view and it gives only one side of the ledger.

Now, even if we drill more deeply into this question of externalities we have the "I, Pencil" point, the benign dictator issue, why is it that the scheme is setting itself up as dictator of a price to be paid by a third and fourth party which does not actually reflect an underlying contractual relationship, which it says somehow is optimising the output for the scheme as a whole?

So if, as Mr Dryden has suggested, the only plausible explanation would be curing a positive externality so somebody is free riding without paying any of the benefit, why is a private party well suited to cure a positive externality? The whole point of externalities, as I understood it from admittedly some

rudimentary A Level analysis back in the late 80s, was that private parties would not cure an externality, that is why they were external to the free market, one need think only of the classic case of a negative externality, pollution arising from a coal-fired power generation unit not taking into account the societal impact of polluted rain falling in Scandinavia, which was the classic example that was given back then.

Of course public subsidies have been required to move away from the societal costs of coal-powered fired generation of electricity towards promoting renewables precisely because you are not catering otherwise in the market for the positive and negative externalities of renewable generation.

PROFESSOR WATERSON: I think in economics, it could be possible for a private party to cure an externality, but commonly they do not.

MR BEAL: Thank you, I am very happy to have my A Level updated. Where we get to, of course --

PROFESSOR WATERSON: The jukebox is a classic example.

MR BEAL: Sorry.

PROFESSOR WATERSON: The jukebox.

MR BEAL: Yes, yes. The schemes are not intrinsically motivated, we say, to solve an externality arising between the cardholder and the merchant and that is

primarily because they are not -- the schemes are not the ones who are deriving the alleged positive externality. By contrast, Dr Frankel pointed out that since the cost of payments such as cash generally falls on the merchant, merchants do have reason to incentivise cardholders to minimise payment costs or to internalise the externality prompted by their choice of payment.

So if, for example, a payment card is cheaper than cash for a merchant one would expect a merchant to be saying to the cardholder if you have got a card, I will give you 99% rather than 100% of the payment price, if you use the card rather than cash.

So you discount at the till for use of a payment card.

But of course if it is a private party that is setting the level of the subsidy to cure an externality then that gives rise to the risk of inefficiency and the incorrect signals being sent through the over subsidisation of issued cards and therefore that is why the full fat article 101(3) analysis is so crucial because one needs to understand all the costs and benefits and, secondly, to understand what is the optimal level that is being set.

Now assuming -- and we say it is right that the schemes must be pursuing profit maximising behaviour,

they will necessarily set the maximum rate that merchants can endure consistent with the policy of universal acceptance and they do so precisely in order to grant that very substantial subsidy that I have been talking about to the issuing banks. That subsidy is given to try and incentivise them to issue more cards, more cards equals more transactions, more cards, more transactions equals more money to the schemes. But there is no reason a priori to think that that optimises allocative efficiency between both sides of the market or indeed any other efficiency and that issue we say should only and can only be considered at the article 101(3) stage.

The fact that the MIF has arisen and has persistently been justified as a cost allocation device or as bringing balance between these two sides of the two-sided platform does have its roots we think in the historical position of everyone being both an issuer and an acquirer but we have seen substantial accrual of market power since then with the establishment of what is, if one were calling it candidly what it is, a duopoly of Visa and Mastercard, we have seen the repeal of the no issuing without acquiring rule, we have seen the disaggregation I have mentioned, and the position now is that there is simply no connection

between most of the issuers and most of the acquirers in the market and therefore the necessity for deriving a balance between them, even if one ever existed, has clearly disappeared.

Next point is that the MIF itself is simply not objectively necessary for any payment system, it is not found with cheques in the cheque system, it is not found in the Faster Payment system, you do not see it when you make a SEPA payment using an electronic bank account. What you do need for a payment system to work are certain core rules. So you need to have a means of ensuring that the payment is received by the merchant, otherwise the merchant simply will not enter into the transaction. Why would they? You need to have a means of getting the money from the cardholder to the merchant. There therefore has to be a mechanism for the authorisation of the fund transfer from the issuing bank to the merchant acquirer and you have to have rules for clearing and settlement of multiple transactions. There has been a flurry of notes on this issue of clearing and settlement. Some of it is not entirely clear.

It is regrettable, with respect, that this was not sorted out sooner because I could have at least asked some of the witnesses exactly what they meant. But what we have tried to do -- and I will come to it later -- is

muddle through. I did have some experience of this when I was acting for the revenue in the *Bookit* case and I am going take the Tribunal to the *Bookit* case and explain what I understood the position to be back then.

But the short point is both of these schemes, if they are functioning as they should do and indeed as they presently do, do clear and settle all of the funds that are run through the payment scheme and you do end up with a very strange position which I will come to on the bilaterals counterfactual, where if it is right that you hypothesise away clearing and settlement, you do not actually have a scheme, which seems a counter-intuitive response to a competitive concern.

So you have to obviously clear and settle multiple transactions because nobody even with a very expensive transaction is going to do it on an individual basis, there has to be rules for batching those transactions at the merchant level and the acquirer then passing them on in electronic format to the scheme and you need to make provision for charging to cover the costs of the payment scheme because otherwise the scheme will make a loss because obviously it costs money to operate a payment scheme.

Those costs are charged to the participants and in theory you would expect the costs to reflect the cost of

participation by each side of the market.

You then need to have a rule that says that payment is either being dealt with through settlement at par, i.e. the underlying transaction is transferred for full value, or some other means of determining what value is to be ascribed from cardholder to merchant, via the issuer and the acquirer.

The MIF has been retained by the schemes in their four-party schemes and notwithstanding the changes I have described.

The mechanism of setting the MIF is important, we have set it out at paragraph 16, page 6 of the note and it involves, we say, seven key stages and this applies, we say, regardless of which MIF is in issue.

Firstly, the scheme rules require a MIF to be paid by the acquirer to the issuer. That does not -- and I will come on to look at this when we see in paragraph 18 the six essential facts of the *Sainsbury's* Supreme Court judgment, the scheme does not say who has fixed that MIF, it simply says a MIF must be paid.

That sum of money is then deducted by the issuer from funds which it transfers to the acquirer. The acquirer has no option but to take the money it is sent. It has no realistic option to request payment of a higher sum of money for a given transaction. So if

the issuer simply does not transfer the full sum, absent some dispute mechanism in the scheme itself saying you have not remitted the full amount of money, that is what the acquirer is left with because that is what it receives into its bank account.

In an IC plus plus contract the MIF will be passed on to the merchant. We say even in blended contracts an appreciable and substantial proportion of the MSC is attributable to the MIF and that has become something of a dead issue, precisely because of the prevalence of IC plus plus pricing.

Sixthly, the merchant has no realistic option of paying a lower sum so the merchant is not given the choice to negotiate that MIF, set by scheme, it is non-negotiable from the merchant's perspective.

Then finally on rate setting, the rate of the MIF in the factual is set either by Mastercard or by Visa and has been throughout the claim period.

I will come on to deal with the wrinkles about what do I mean by Mastercard or Visa in that context as to does it matter who set the MIF, answer: following *Dune* Court of Appeal, no, but there is still a wrinkle that I need to come to.

Now, the witness evidence that I have cited in paragraph 17 confirms that the essential mechanics of

the MIF have remained the same for all categories of MIF: domestic, intra EEA, inter-regional and commercial and I have given there the evidence from Ms Suttle and Mr Steel that confirm that.

So how does that plug into the Supreme Court's analysis? Well, the only issue that is not dealt with by the Supreme Court is the one at 16.7 which is the rate of the MIF is set by Mastercard or Visa because actually who sets the MIF is not one of the founding essential facts that is dealt with in paragraph 93 that I have extracted at paragraph 18. So just going through these, the Tribunal is very familiar with these, they have been the subject matter of expert evidence, my cross-examination to the witnesses and my opening submissions.

But there are six essential facts, the MIF is determined by a collective agreement between undertakings, that is the first one. It does not say it is set by Visa or Mastercard or who it is set by; it simply says the MIF is a sum, it is a transfer -- default transfer price that is determined by collective agreement between undertakings.

Two, it has the effect of setting a minimum price floor for the MSC. Well, that is incontestably true for IC plus plus pricing and albeit at a relatively late

stage of these proceedings, it is now accepted that that is enough. So all of the shenanigans we had at the CMC stage of the evidence to show was there pass-through of the underlying MIF to the MSC has gone because -- I mean, the PSR reports tell you the high prevalence by volume of transactions that are on IC plus plus pricing just means that is not a live issue for appreciability, it is sufficient that there is an appreciable effect on the market from IC plus plus pricing which necessarily by definition sets the price floor for the MSC.

Three, the non-negotiable MIF element of the MSC is set by collective agreement rather than by competition. That is incontestably true so long as it is the scheme that is saying a MIF has to be paid and that third point actually is not in dispute, regardless of the counterfactual that is landed upon. It will always be a scheme that is saying: these funds have to be transferred from an acquirer to an issuer because otherwise you do not get the guarantee of those funds being transferred and that is the entire purpose of the counterfactuals that are being put forward by my learned friends. They need that positive transfer of funds because otherwise they say their schemes would suffer competitively vis-a-vis third party schemes and/or other four-party payment schemes and suffer either a death

spiral or a seriously unwell spiral leading them to lose share in the market.

The fourth element is the counterfactual is no default MIF with settlement at par. That of course is the factual finding by the Supreme Court that the schemes have sought to unpick by saying if you do not like that counterfactual we have others and they are trying to rely, as you know, on two counterfactuals, one is the UIFM and the other is the bilaterals, and I will be making detailed submissions on those. But my headline point on the counterfactuals that they have selected is that it is old wine in new bottles and that is simply because the whole purpose of the selection of the counterfactual that they have landed upon is to ensure that positive transfer of funds from merchant to issuer going through the acquirer. That is the sole purpose behind what they are doing, it is the objective -- that is not to say subjective motivation. That is objectively what they are trying to do and what they avow they are trying to do because they say without it, the scheme cannot survive or would not do as well.

So they need to come up with a counterfactual that basically produces the same end result and the same end result will be all of the other elements that the Supreme Court has focused on here, it will be

a collectively determined MIF, collectively determined because it is still part of the operation of the scheme; two, it will still have the effect of setting a floor; and three, it produces a non-negotiable element of the MSC as a result of the collective agreement that is reflected in the scheme itself.

The fifth point is in the counterfactual there would ultimately be no bilaterally agreed interchange fees. "Ultimately" is the key word there and I went through with I think it was Dr Niels the genesis of that from the General Court in Mastercard and the Court of Justice in Mastercard, the point being there would be a transient period when the MIFs were removed and default settlement at par was in place, where there might be some transient bilaterals agreements in order to preclude chaos in the market but over time the MIF would be competed away so that it ended up at zero. That is the thought process and that is the anticipated outcome that is part of the thought process in the counterfactual that the Supreme Court was considering.

Then finally, and this is an important one, (vi), the whole of the MSC would be determined by competition and the MSC would be lower. So there is two aspects to that: the whole of the MSC would be determined by competition. Well, of course when you have any scheme

rule that produces a positive MIF that simply is not going to hold good because whatever the scheme does, if the effect of the scheme and the object of the scheme is to impose a positive MIF on the merchants then the merchants are left in no position but to have a non-negotiable component of the MSC and indeed the European Commission in *Mastercard I* said exactly that, it said any positive MIF suffers from the flaw, F-L-A-W, that it sets a floor, F-L-O-O-R, to the MSC and as a consequence of that, the MSC in a significant component is non-negotiable as between the merchant and the acquirer.

Secondly, the second point is that the MSC would be lower. Well, of course if the MIF does not establish a core component of the MSC, it stands to reason that the negotiated outcome between the acquirer and the merchant would lead to lower MSCs and of course that, to foreshadow a point I will make later, is focusing very much on Mastercard and Visa transactions not on the -- what would happen in other parts of the market on the issuing side, would it lead to switching to other forms of payment such that the overall Merchant Service Charge for all means of payment in a different market would be higher? That is not the analysis that the Supreme Court is conducting at this stage and that is relevant to

issues 4 and 5.

Now, on clearing and settlement, we do have a detailed section in our written closing in section B5 on this and we analyse the notes that have been produced by Mastercard and Visa. Could I please take you to the *Bookit* case, it is at {RC-Q3/29/3}. This was a case involving VAT which adds to life's rich tapestry in terms of following. That seems to be the wrong -- Q3/49. {RC-Q3/49/3}. That is it. Thank you very much.

So Bookit, as we see from paragraph 8 on that page, was a company that was owned by Odeon and for a while if you booked a ticket at an Odeon Cinema, and you studied the small print, you would receive a card handling fee payable to *Bookit* and then a ticket price payable to the Odeon Cinema and HMRC took the view that is splitting out part of the consideration for overall supply of a cinema ticket. One of the issues was: is the card handling element of it an exempt supply for VAT purposes or a standard rate of supply? None of that need obviously concern the Tribunal, thankfully, and it has been determined in this case.

But what is interesting is the factual background given at paragraphs 11 through to 17 because quite a lot of the arguments as to whether or not the card handling service was going to be exempt or not required an

understanding of whether or not the card handling service represented a transaction concerning payments, i.e. did it involve the movement of funds in itself? So we get quite a lot of background.

Would the Tribunal please mind reading 11 through to 17.

THE PRESIDENT: No, of course. (Pause)

Could we move, thank you. (Pause)

Yes.

MR BEAL: What that shows is that the technical process involves the daily batch files, those being submitted in that case via an intermediary who was acting as a processor to the merchant acquirer. The merchant acquirer then feeding into the underlying payments scheme and discharging merchant acquiring duties.

So when Mastercard's note in particular refers to processers and intermediaries acting for the acquiring and the issuing side this gives an example, DataCash as performing a pure data processing service of grouping together different files, merging them, putting them into the right format, transferring that formatted file to the merchant acquirer. The merchant acquirer then receives those and it is the merchant acquirer that then interfaces with the scheme because it is the merchant acquirer on the acquiring side that is the fully paid up

member of the Visa and the Mastercard scheme and discharges its obligations to clear and settle transactions via the scheme.

On the issuing side, obviously you are capable of having processing entities as well if you choose to use them. None of that alters the fact that at its core, a payment system has to have a process of clearing multiple transactions because otherwise it is mayhem; and, secondly, if it is a sensible system, it will have overall control of settlement because it needs to be able to net off on a net basis different payments going to different parties to generate efficiencies and I will come back on to this when we consider the bilaterals counterfactual which seems to envisage both clearing and settlement being dealt with purely on a series of myriad bilaterally negotiated arrangements across the EEA.

Those are my opening observations on the scheme and how the scheme works. With your permission I will now move on to some brief observations on the factual evidence. We have dealt with this in more detail on a witness by witness basis, I am conscious the Tribunal will have formed its own views, what counsel says about how a witness performed is usually correlated with whose witness it is and there is a danger of obviously some degree of inherent bias slipping in there somehow. So

I am not going to dwell on this. All I would say is that without saying "I told you so", you will recall that in the September CMC I had an interchange with you, sir, and I think we both rather thought that the -- were skeptical as the benefit that would be gained by having a large number of claimants' witnesses all saying much the same thing. If I can say this without being disrespectful, we were both right, because so many of the claimants' witnesses were stood down as being unnecessary and the only ones who were called, the only pattern I could detect was that the ones who had suggested that they might surcharge were brought over hot coals to see whether or not that was true and, if so, to what extent. So that was the only common theme I could detect but it was possible that there was some underlying rationale for the ones who were chosen.

The claimants' witnesses who did attend we say gave straightforward evidence. You will recall Mr Steeley's graph that was a closed confidential document, so I will not relay it, but it was extremely useful at showing the spread of payment methods, the halo effect and the other matters that he spoke to in open session. So benefit and burden again being an important part of an assessment from a merchant's perspective of a particular payment method, it is not simply about

underlying MSC rate, it is also what else does it bring to the party.

Mr Bailey of Pendragon gave the evidence on surcharging. He was quite keen I think to surcharge because it cost him so much money. I think his evidence interestingly was that when it was a pence per transaction fee he did not mind because of course the transaction was so much more valuable than the pence that he was paying. But as soon as it became ad valorem and it was affecting his bottom line, he objected vehemently and he tried to put into place various surcharging methods, some of which were successful but you heard his evidence that dealers did not like causing friction at the end of a negotiated process. They did not want to see the customer walk off to the garage next door and so they generally had to swallow it.

Mr Hirst confirmed that different payment products brought different costs and benefits. He gave the example of Klarna and PayPal being willing to adopt some sort of common approach to marketing that was of their mutual benefit so that Klarna would be -- Dr Martens as a brand would be splashed on a Klarna page or vice versa so they would get mutual benefit from the association and that those products brought new customers through the door of Dr Martens' store.

The striking thing was all witnesses confirmed that the MIF was non-negotiable and some of those witnesses said in terms: we would love to be able to negotiate it but it is the one cost we cannot control, or words to that effect. We do say that was telling because that shows the merchant predicament. If the merchants are to use and accept these payment cards they have no choice about the cost that they pay of doing so.

I do say in paragraph 20 that the reasons for calling Mr Hirst to give evidence remain opaque but it was not clear to me that the reason why he had been recalled then formed the basis for the questions that were put to him but I suspect, that gets filed under the category of gentle moan and I will move on.

MR TIDSWELL: Just on the pence per transaction, the ad valorem point, I do not think it really has surfaced in the evidence that we have had, it is quite an interesting point that if you go from -- if you are thinking about transaction costs, you go from something which has been set presumably to some reference to some cost and it goes to a percentage basis which presumably has much less reference to the actual transaction costs, particularly when you think about the Pendragon example.

MR BEAL: Yes.

MR TIDSWELL: Is there anywhere that that is detailed in the

-- particularly I suppose the regulatory decisions?

MR BEAL: Not in the regulatory decisions. It is a feature of the pricing at around the time that the *Visa* commitments decision came in in 2014 because Visa at that time from memory had a variety of different rates. If one looks at some the historical merchant service agreements in bundles J1 and J2, the early ones all have a listing of pence per transaction plus an ad valorem element, some with a cap, so Visa's pricing for example would traditionally have -- I do not know -- 10% -- 10p per transaction plus 0.1% with a cap of £1.50, for example.

What has happened, certainly since the IFR, is that there has been a migration towards straightforward ad valorem pricing. In fairness to the schemes I think they are concerned with breaking it out into a pence plus percentage approach is that they could not guarantee to be hitting the weighted average requirement set by the IFR and so everyone has defaulted to ad valorem pricing rather than pence per transaction plus because it becomes unduly complicated to work out your compatibility with the caps.

The interesting evidence relates to at or around the time of the commitments, we see evidence as in Dr Niels' report of a large number of cross-border acquirers

suddenly coming to the fore and acquiring an awful lot of transactions.

That only worked for large merchants and the reason it worked for large merchants was that the smaller merchants typically were still on the pence per transaction rate and the ad valorem figures therefore did not matter so much because they had lower value transactions. When you are a large merchant with large value transactions, a BPS difference in the rate can make a significant difference and so when we look at the figures that are already closed as to how much merchants were going to benefit from switching to Worldpay BV from Worldpay UK, it was hundreds of thousands of pounds per year collectively over -- more than that, precisely because they were also moving to an ad valorem rate that was lower and without caps with an ad valorem rate in the UK that was higher, the margins made sense.

So that is a long-winded way of saying there is evidence out there and it tends to go to that issue and it is around that type of period that we will find the raw data but I do not think any of us have concentrated on it.

I am also told it is in Mr Hirst's 2016 statement that required a fair amount of evidence to get to so I am being given paragraph 70 RC-M3 -- which is not

Mr Hirst -- {RC-M3/1/20}. Could we bring that up please. Paragraph 70 at the bottom the page there.

THE PRESIDENT: Yes.

MR BEAL: Yes, that is -- thank you very much, that is the evidence:

"Until 1 March 2015, Visa charged an ad valorem ... on all domestic credit card ... and a flat fee on all domestic debit ... A fixed pence per debit ... transaction has been the case for as long as I can recall ... Then in March 2015 Visa started to charge an ad valorem fee on domestic debit card transactions as well. The impact of this on merchants was generally mixed."

Mr Hirst in this statement I think gives the evidence that he approached Worldpay on behalf of Tesco and said: what are you going to do about this? We are suddenly paying a lot more on debit. To which Worldpay then developed a scheme whereby -- a scheme -- they developed a solution whereby they relocated to the Netherlands, using a subsidiary, Worldpay BV, I think, a related group company, transferred all of their regulatory requirements to the Netherlands and started cross-border acquiring.

MR TIDSWELL: I suppose the point -- in context of this case the point is that if the impact was mixed perhaps it

does not really matter very much for present purposes, some merchants have people going into a corner shop and buying a drink with a debit card and there was a fixed fee on that it might have felt more painful than the ad valorem, whereas obviously Mr Hirst felt the pain when it became ad valorem, I suppose that that is just an averaging point, is it not, as you say the IFR required effectively a degree of averaging?

MR BEAL: Yes. I mean, above a certain point I think it will make a difference to switch from one to the other. It is just a question of the mathematical calculation required to produce the tipping point.

MR TIDSWELL: But it is not something that you particularly pull out as being significant obviously, is it?

MR BEAL: No, no, because both of them are MIFs and both of them feed into the MSC and both of them are non-negotiable at MSC level and that is the vice, that is the competitive vice that gives rise to the merchant predicament and it arises as a result of market power and pace Mr Dryden, that is enough to tick all the boxes.

MR TIDSWELL: Thank you.

MR BEAL: Thank you for that. The defendants' witnesses -- I mean, some of them obviously gave very straightforward evidence, yes/no answers, tried very hard, sensibly

engaged with the questions. Some of their witness evidence obviously consisted of legal submissions and with each of those witnesses, I pointed out I would not be engaging with them on those legal submissions but I have cited in particular Mr Stokes and Mr Korn. Mr Stokes was of course a former competition lawyer and he was dealing with the regulatory history, so one can understand how he had ended up slipping into some legal analysis. Mr Korn was dealing with the legal position in terms of surcharging and so on. So again one can forgive him for at least trying to set out what his understanding of the law was.

Where there are assertions that something was not unlawful or anti-competitive or should have been justified and the associated implicit criticism of a regulatory decision they did not like, that was obviously much more on the other side of the line, nobody likes losing and I can understand why they felt obliged to say that they did not agree with the decisions and so on. But of course all of that is a legal matter and not for them.

More critically we say quite a lot of the witness evidence was long on assertion and short on fact but it did not have the underlying data to support it. When I cross-examined quite a lot of the witness as to why

they were saying for example costs were much higher in commercial cards or why it was that issuing banks bore so much of a share of the particular costs of fraud and so on, there was not an awful lot to back it up. There was quite a lot of: well, I spoke -- had conversations with issuers, or I used to work in the Bank of America, or a friend of mine used to work at NatWest. It was all rather speculative, if I may say so and that gives rise to the usual warnings that are given in *Scullion v Bank of Scotland* where giving evidence on hypothetical matters in particular such as I would say the counterfactual, particular care is needed because the hypothetical in *Scullion v Bank of Scotland* was what steps would have been taken if negligent advice had not been given. Our counterfactual is what steps would have been taken if the MIF had been stripped out. So it is a hypothetical speculative exercise where in a sense, as I said in opening, any one person's opinion is as good as anyone else's in theory.

Obviously if you are the one who is trying to put something in place to deal with a situation, you are hypothesising what steps you might take and here I am thinking of for example the Mastercard evidence trying to work out what alternatives to MIFs they might land upon that is in the old AAM proceedings witness

statements, that might have more relevance because of course they are then dealing with actual projects they put in place to try and work out a way of operating in a non-MIF world and you have seen the evidence, I took Mr Willaert to it, where one or two of them were raised with the European Commission and the European Commission said: very sorry, we do not like that because it is a formula by which you achieve the same point of the MIF.

So that sort of evidence is more useful. But if it is simply we would have done this, would we not, because it makes sense, then one does need, we say, to press down on that and say: well, actually, does that really stack up or are you just saying it because it gets you out of a problem that you otherwise face?

Then secondly, Mr Justice Leggatt's observations in *Gestmin* as to concerns about the reliability of witness' recollections, the tendency witnesses may have to try and think things through in a certain way if they are geared towards achieving a certain end and both of those common sense reflections from learned judges will be borne in mind, I am sure, by this Tribunal.

There are some other witnesses, and I do not wish to single any of them out necessarily in open session, but they are mentioned at paragraph 22 where, with the

greatest of respect, I struggled to understand some of their positions that they were taking and we have gone into more detail on that in the written closing.

Could I then please briefly deal with observations on the expert evidence. I have cited in paragraph 23 an extract from a speech that was given by one Nicholas Green QC, as he then was, at a book launch of Dr Niels' book in 2011 and the reference is footnoted, I have not added it to the bundle because I do not think it needs to be. But Mr Green QC, as he then was, was commenting on the first edition of Law and Economics by Dr Jenkins, Dr Niels and Ms Kavanagh and he posited two laws of economics. The first law of economics was that for every economist there would be an equal and opposite economist. His second law of economics -- this is where it strays into the unfair category, the second law of economics was they would both be wrong.

Now, that is obviously lighthearted but what you do have here quite clearly are two sets of economists who are coming at things from different angles, which mirrors their clients' respective positions and as always, this Tribunal will be aware of the blurring of lines between advocacy and independent expert opinion, I hope after five weeks of trial I will be permitted a couple of observations.

Firstly in relation to Mr Dryden. He consistently gave yes/no answers which, with the greatest of respect, is quite unusual actually in my experience of cross-examining experts in this Tribunal. He gave a higher degree of yes/no answers I think than I have ever seen from an expert witness, which does him credit in my respectful submission. Dr Frankel gave fewer yes/no answers but obviously was giving the benefit of his very substantial experience over myriad jurisdictions dealing with interchange issues. I have no doubt -- I have not read them yet -- that the defendants will say well, he has got an axe to grind, he has been at it so long, he is an anti MIF crusader and so on. It is true he has consistently expressed objections to the MIFs but those objections are all grounded in economic theory and in circumstances where his work was relied upon as early as 2006 by the OFT to support a settlement at par counterfactual, he has been remarkably consistent over that period as to both his criticism of the MIF and, secondly, his solution to it which is to have a settlement at par system.

Now, we do have to say in contrast, the evidence from Dr Niels and Mr Holt suffered from a number of drawbacks. Firstly, there was a selective impartial recourse to the regulatory history. Each of them tended

to land upon the historic *Visa I* decision and the *Visa II* decision, the exemption decision, in support of a proposition without then giving the Tribunal indications that they had also taken into account the six or seven regulatory decisions since those days. They relied on witness evidence which did not have any underlying data as accurate without delving into whether or not it was accurate and whether or not it was supported by any data sources. Each of them adopted data for analysis which was skewed in favour of the answer they sought to be achieving, so in particular I am thinking of the particularly high level of Amex MSC that was used by Dr Niels and adopted by Mr Holt in some of the switching analysis where they picked a figure of I think 3.9% for an Amex MSC where a variety of evidence suggested that it should be no higher than 3.25, 3.125, and some of the evidence going the other way was it fell as low as 1.9%. So picking the highest figure possible then plugging that into the switching analysis does not really make for an impartial view of the data.

Next they relied on unreliable survey evidence. As Professor Waterson pointed out, the respondents to one particular question given the percentage would have been two people which does not inspire confidence in terms of the reliability of the survey that is being put forward

as the best evidence of switching behaviour. Their expression of views was inconsistent, with respect, with a series of widely accepted academic literature in particular the use of the issuer cost methodology even though that has been rejected, indeed it is accepted to no longer be acceptable following work by Professor Tirole and Professor Wright, I put some of that material to Dr Niels and Mr Holt refused to accept that Visa had market power, which I have to say I do find surprising given the data.

They adopted an economic analysis which did not seek to stay within the tramlines of the legal test. The obvious one on that was Mr Holt actually recognising in one paragraph of his eighth report what the legal test was for objective necessity and then simply failing to apply it when he came to look at whether or not a particular rule or MIF was objectively necessary.

Then finally and in marked contrast to Mr Dryden, there were not exactly very many yes or no answers; there was a tendency to give a partial answer and then some of them, well, they each had a tendency to make a speech where it was appropriate.

PROFESSOR WATERSON: Mr Beal, would you agree that in fact none of the expert witnesses made much use of the data that they had been provided with?

MR BEAL: Well, I think a lot of the data analysis ended up going to dead issues, that is the problem. So they spent an awful lot of time analysing the question of acquirer pass-through which because of the prevalence of IC plus plus pricing just became irrelevant. I mean, to be fair, I think Mr Dryden had said at various CMCs over the months that we were leading up to trial none of this made sense to be chasing down this level of data that was said to be required because of the prevalence of IC plus plus pricing and so it proved right.

So I think the trouble is that they were all concentrating on the thing that ultimately became irrelevant.

The other issue in terms of the data is that Mr Dryden and Dr Frankel simply did not think that this was an article 101(3) analysis and so to the extent there has been a belated attempt to try and shoehorn some sort of efficiency analysis into the switching issue, for example, we are in a position where there is simply no data there for that. That is why the article 101(3) lite analysis is so perilous because if this were a 101(3) trial, you would expect to have a vast array of data and a vast array of material costs details from issuers, details from acquirers, details probably from Amex as to what their position is on

things, and we do not have any of that.

So yes, with respect, I agree that the -- data crunching the data analysis has been very thin but that is probably because it does not go to any live issue that is for this trial.

PROFESSOR WATERSON: In your view, were there other areas of data that they could have looked at that none of them chose to do so?

MR BEAL: Well, if one is adopting a --

PROFESSOR WATERSON: Without going to 101(3)?

MR BEAL: Yes, well, is there any other relevant data? No. If one is to conduct a 101(3) lite analysis that is not skewed, what other data would you need? You would need all the issuer costs, cardholder benefits data, costs that acquirers incur with fraud prevention and detection, costs that acquirers incur by way of credit risk, because if the MIF is a default transfer fee for services or to bring balance to the force, you need to understand what goes into both sides of the equation. You need both sides of the ledger and at the moment we only have one.

PROFESSOR WATERSON: Yes, I agree.

MR BEAL: I hope that answers your question, sir.

PROFESSOR WATERSON: Thank you.

MR BEAL: Right, that brings me to principal legal

disagreements. That is a relatively lengthy topic. I am wondering -- we are on page 8 and I am making good progress, 8 out of 40, so I am wondering if that is a convenient moment to take a short 10-minute break for the transcriber and then I can deal with legal analysis and move on to the issues in the course of the rest of the morning?

THE PRESIDENT: Yes, that would be very helpful, Mr Beal. We will rise for 10 minutes.

(11.15 am)

(A short break)

(11.29 am)

MR BEAL: At the bottom of page 8 of my note I identify five separate core legal disagreements between the parties.

The first concerns the boundary for analysis between article 101(1) and article 101(3). This is dealt with in our written closing at section G2 -- in fact, all of these five points are itemised at sections G2 through to G6 but what I am proposing to do is just give you edited highlights of the points. I obviously went through quite a lot of case law in my opening and the Tribunal will be very familiar with it so I am hoping I do not have to labour it too hard.

I do not think I have taken you to *Metropole*. Could we start, please, with that decision it is at

{RC-Q3/23/25} and this was the seminal case which put an end to suggestions that article 101(1) should be operating a rule of reason analysis and if we look, please, at paragraph 74 the General Court sets out precisely what the division is between the different parts of article then 85. Please would the Tribunal read paragraph 74. (Pause)

Then in 76, which is over the page at page 26, {RC-Q3/23/26} top of paragraph 76 says:

"Those judgments cannot, however, be interpreted as establishing the existence of a rule of reason in Community competition law. They are, rather, part of a broader trend in the case-law according to which it is not necessary to hold, wholly abstractly and without drawing any distinction, that any agreement restricting the freedom of action of one or more of the parties is necessarily caught by the prohibition laid down in Article 85(1) ... In assessing the applicability of Article 85(1) to an agreement, account should be taken of the actual conditions in which it functions, in particular the economic context in which [it] operates, the products or services covered by the agreement and the actual structure of the market concerned ..."

So that is a permissible prism for the framework of analysis. What you do not do is launch into the broader

what are the pro and anti-competitive effects of this particular measure being weighed against each other because that is for article 101(3).

Now, this whole distinction obviously has assumed less importance following decentrallisation of competition law enforcement. The Tribunal will recall back in the day when one had to notify restrictive agreements that fell within what was then what 85(1) of the treaty to the Commission, that jammed up the works considerably. Now that national courts are free to apply all aspects of article 101(1) the division between the two is less procedurally significant than it used to be. Of course that means that keeping the proper framework of analysis is more important because what you do not want to do is to find yourself short of data at the 101(1) stage and trying to discharge essentially what is a 101(3) obligation on the cheap, if I can put it that way.

In terms of how the European Commission dealt with this in Mastercard, that is at {RC-J5/11/131}. We did look at this in opening and I will go back to it if I may and just bring out some edited highlights at Recitals (454) to (438). We see in (454) the Commission saying:

"Under Article 81(1) of the Treaty, there is legally

no reason why the negative effect of the MIF on prices in the acquiring markets ... should not constitute a restriction of competition because of potential benefits which a MIF may create for cardholders."

So once you have established that the MIF has an effect on prices in the acquiring market which is to the detriment of merchants you do not chalk that off on one side and say: hold on, there are some benefits that may arise for cardholders.

Then at (456) through to (458), they rejected the submission from Mastercard to the contrary that somehow there was a cost allocation or a balance that was being brought to different sides of the market, rejected the tax analogy at (457), and at (458) they concluded:

"If the restriction of competition within Article 81(1) had to be interpreted as Mastercard suggests then [it] would be entirely deprived of its ... effet utile."

In other words, you would essentially compress the separate stages of 101(1) and 101(3) into a single provision.

Now, as I say, there is no reason why that could not in theory be done and I suspect that the reason why historically it was separated was because of the centralised enforcement from the EU Commission but that

is not the system we have been operating on and indeed it is not the system that has been adopted for the Competition Act, either in UK or in Ireland, so that is Mastercard.

This approach was then upheld in the General Court's judgment. This is {RC-J5/16/24}. If we could look, please, at paragraphs 181-182 towards the bottom of that page. 181 and then 182 is overleaf, please would the Tribunal read 181 and 182.

THE PRESIDENT: Yes. (Pause)

Yes.

MR BEAL: Could we then please move to page 28 and 29 {RC-J5/16/28-29} and look at paragraphs 208-211, which deals with the balance being brought to the system argument. Again it is probably quicker if the Tribunal would simply read 208-211. This is -- now we are now into the article 101(3) analysis at this stage. (Pause)

Three points then about the balancing argument: one, it has been run before; two, it was rejected as being relevant for the 101(1) analysis; three, even at the 101(3) stage it was rejected on the facts precisely because they had only brought into the equation one side of the relevant benefits and burdens. That is an unprepossessing start for running the same point before this Tribunal over the last five weeks.

Turning then, please, to the Court of Justice decision, this is {RC-J5/22/31}. Again I think the quickest way of dealing with this, if you will bear with me, is to invite the Tribunal to read 178 through to 181. (Pause)

THE PRESIDENT: Yes.

MR BEAL: Thank you very much. So again the alleged economic advantages are only to be considered at the article 101(3) stage, not here.

I appreciate in a sense this is an unwelcome submission because we have spent so long dealing with some of these issues and I certainly do not mean to be smug when I did say we were going to have to deal with it on a belt and braces basis and no doubt that is the basis upon which the Tribunal is proposing it too, but my core submission is none of this is for now and pace Professor Waterson's point, if it were for now, we would have a massively different suite of evidence before the Tribunal.

Next up, please, Court of Appeal in *Sainsbury's*, {RC-J5/28/40}, paragraphs 161-162 is the rejection of the death spiral arguments or its near neighbour, the seriously unwell argument that is now being advanced and we see at 161 and 162 again the Court of Appeal confirming it is for the 101(3) stage rather than the

101(1) stage, so you do not look at the alleged impact on intersystem competition; the same argument applies equally with you do not look at the impact on the issuing side of the market. Yes, of course, the fact that there is an issuing market and an acquiring market is relevant for the overall analysis of how does this work? But what you do not do, in my respectful submission, is look at what is happening in the acquiring market and then say but that has knock-on consequences in this case, the Court of Appeal were saying, for the intersystem market, in our case not just for the intersystem market but for the issuing market and saying as a result of that, it follows that there is no restriction of competition. What you have to do is say there is a restriction of competition in the acquiring market, can you justify it? Justification is for article 101(3).

Then if we turn, please, to the Supreme Court in *Sainsbury's*, {RC-J5/36/61}, paragraph 172, we see where the Supreme Court was dealing with the balance being brought allegedly to both sides of the market. That was in the context of the article 101(3) analysis.

So the Supreme Court is looking at the restrictive effects of the measure on consumers in only one of those markets, and where consumers in both markets are not

substantially the same, it has to be proven that the commercial course is appreciable objective advantages for consumers in the market whether restrictive effects are felt. So the acquiring side, not just the issuing side and none of this is for now, and that is confirmed by the Supreme Court's approach.

Indeed, there were times I sensed --with Mr Holt perhaps rather than with Dr Niels -- where that was recognised, that this may well all be for a future date rather than now. But of course that did not stop both experts seeking to develop what I can only describe as an article 101(3) lite approach which we say fundamentally subverts the approach to the treatment of the distinct issues in the 101(3) universe. So -- and there is serious risks of starting the job, having to make provisional findings and then realising at the end of the trial in March 2025 that the whole thing that has been put before you over the last five weeks is but a snapshot of one side of the equation and does not give the full picture and that is, in my respectful submission, a real risk procedurally with trying to deal with any of these issues on anything other than a provisional basis at this stage.

But the Tribunal is alive, I am sure, to the complexity that goes behind that particular issue.

Right, the next legal question that divides the parties is the proper approach to assessing an object infringement. Part of the trilogy of cases that came out at Christmas 2023 was the *International Skating Union* case, it does have a helpful section on restriction by object. Please could we look at {RC-Q3/62/18}. I went to this case in opening but I now would like to just focus on the test. Paragraph 103 is -- if we start there, please, gives a classic example of anti-competitive conduct by object being:

"... collusive conduct which are particularly harmful to competition, such as horizontal cartels leading to price fixing, limitations on production capacity or allocation of customers."

Now, it is obviously -- everyone always sort of sucks in their teeth when the word "cartel" is used but if in fact you have a horizontal agreement between competitors that has the object of limiting for example production capacity or allocating customers between them, or indeed shutting off sources of supply between them, then that is grouped together with the examples of collusive conduct -- or co-operative conduct if one does not want to use a pejorative term -- that is particularly harmful to competition.

So imagine co-badging. Imagine one scheme saying to

an issue bank: you cannot put a competing scheme on this card. Well, that is shutting down a source of a market for the issuing bank who might want to co-badge two different schemes together. If that were being done by reference to widget production in the United Kingdom then it would be a straightforward attempt to allocate widget production between two competing suppliers. Now, transforming that into the context of the MIF, it is not a million miles to say that is a coordinated approach to a market supply outlet which is restricting competition because an issuing bank cannot put two different suppliers side by side on the same card and I will come on to make submissions on that particular issue later.

So we are not a million miles away from that and indeed there have been findings, as you have seen in the regulatory decisions, that the MIF is a form of horizontal price fixing.

The word "cartel" adds more heat than light, it simply is seeking to reflect coordinated pricing conduct between competitors is not a good thing and that is a universal truth of competition law. However, I do not need to put it as high as that and you will recall the suggestion that was put to Mr Dryden, was that if there was a co-operative or coordinated approach by buyers to try and deal with the MIF that is being imposed upon

them through the MSC so that they try to exercise countervailing bargaining power, Mr Kennelly said that would be a cartel and when I put to Mr Holt: Why is a cartel not when the suppliers unionise their pricing, he was forced to draw some distinctions which I am afraid I simply did not understand.

But I appreciate that the word "cartel" adds more heat than light but it also is important to note that Dr Frankel therefore was being straightforwardly honest when he said: I view this as a cartel because it is a form of horizontal price fixing. That is what the European Commission found in the 2017 SSO issued to Visa.

But in any event, if we then look at 104, it says:

"Without necessarily being equally harmful to competition, other types of conduct may also be considered, in certain cases, to have an anticompetitive object. That is the case, inter alia, of certain types of horizontal agreements other than cartels, such as those leading to competing undertakings being excluded from the market [see co-badging] or certain types of decisions by associations of undertakings [see both schemes] aimed at coordinating the conduct of their members, in particular in terms of prices ..."

Well, on any view stripping out the word "collusive"

and the word "cartel", that is what the MIF does.

There is then a reference to the *Verband* case so if we may, let us please have a quick look at that. That is {RC-Q3/10/37-38}, starting at page 37 and if we could look please at paragraphs 39 through to 41 on that page, it tips over into the next page, please could I invite the Tribunal to read those paragraphs. (Pause)

In terms of the MIF it is not a recommendation, it is a direction, it is mandatory. It is achieving the same effect and it is having a substantial impact therefore an indirect effect on the core component of a separate price. Those are all the boxes that are ticked by the Supreme Court's analysis, paragraph 93 and we see here that it is properly labelled as a restriction by object and indeed one can look back at the remarkable conciseness of the Supreme Court's reasoning and say, well, if they are prepared to analyse the arrangements in that way and in that fashion, whilst they have treated it as an effects case, it can equally be properly categorised as an object finding because all of their findings relate not to the underlying data that is being considered, but simply the logical consequences of the contractual arrangements that are being put in place.

Now, the schemes have relied heavily on the

Cartes Bancaires and the Budapest Bank cases. We have dealt with these in detail in our written closings and we have got a long section. I think our written closing is not yet on Opus. But perhaps if I could turn to *Cartes Bancaires* in the first instance, it is at -- could we pick it up, please, in the opinion of Advocate General Wahl, {RC-Q3/43.1/1} and I have come to this to point out, please, at footnote 5 at the bottom of the page that the Advocate General was aware that Mastercard was going through the registry of the Court of Justice because he pointed out that Advocate General Mengozzi had been assigned to that case and the proceedings were pending and it concerned the examination of certain decisions taken in connection with 'open' card payment system run by Mastercard.

He then said:

"It appears that that case, aside from the fact that it raises very distinct legal questions from those posed in the present case, concerns very different measures for charging multilateral interchange fees."

So Advocate General Wahl has been assigned to this case and Advocate General Mengozzi has been assigned to this case. They have obviously chatted it through; they are aware of each other's cases and the conclusions that are reached in the different cases are explained on the

basis it is very different measures in issue.

If we could then please go to page 19 of this opinion, {RC-Q3/43.1/1} paragraphs 122-124, we there see the learned Advocate General's conclusions about the *Cartes Bancaires* case; in fact, please could I invite you to read paragraphs 122-125.

THE PRESIDENT: Of course. (Pause)

Yes.

MR BEAL: So distinguishing it from the MIF example, because they are different measures, and also saying he did not think that it hit the object test in this particular case, if a conclusion could be reached that it was an object case then you would need to move on to the article 101(3) analysis. If we could look at the judgment of the court which is in a different divider, it is {RC-J5/21.2/14}, if we look at paragraph 70 of the court's judgment, there is a recognition that:

"The fact that the measures at issue pursue the legitimate objective of combating free-riding does not preclude their being regarded as having an object restrictive of competition, the fact remains that that restrictive object must be established."

So the measures that were being considered in the *Cartes Bancaires* case were actually aimed at the specific measures in question which was to ensure that

the levy that was charged to one side of the market was -- sorry, the arrangements that were put in place to make sure that both sides were pulling their weight and having a fair share was intrinsically part of the measure that was being considered. The MIF, in our respectful submission, does not discharge the same function because it is not aimed specifically at the costs contributions from acquirers and issuers, it is being said that it is a proxy for that but that is simply wrong.

The measures in *Cartes Bancaires* were very much geared towards working out who should pay what between two sets of people who were all privy to the same scheme whereas the MIF does not discharge that function.

In terms of *Budapest Bank* we have a detailed section in our written closing dealing with this which is going to be easier for me, frankly, if I invite you to read a couple of pages of that closing, rather than attempting to do so more systematically at this stage. It is at page 198 of our written closing, I do not know if you have the paper copy that was handed up. It is on Opus now, I am told. There is a new bundle S, this is very exciting new bundle S on Opus, which contains the -- I have not got out much recently. {RC-S/1/198}, it should start at 198. There is a section beginning

"*Budapest Bank*"; does the Tribunal see that?

THE PRESIDENT: Yes.

MR BEAL: Please could you be kind enough to read that, it is relatively long, there is a series of subparagraphs, it goes over two and a half pages, but frankly it is quicker than me going through all the individual permutations. (Pause)

A series of short points for both *Budapest Bank* and *Cartes Bancaires* neither of them involved a MIF. That is an obvious point but in a sense so what?

Well, the answer to "so what" is that the MIF obviously represents a default transfer price putting in place a subsidy for one particular side of the market. It has done so without reference to individual costs and nor is it intended to be used for specific items of expenditure by the issuing bank. There is no requirement for it to be used in a certain way by the issuing bank. In contradistinction, the tariff, the levy that was charged in *Cartes Bancaires* was a specific levy that in that case issuers were required to pay towards acquirers or rather it was levied by the scheme as a whole which had the effect of balancing out perceived activity rates between the acquiring side and the issuing side, so it was levied by the scheme centrally on the basis of you are party to this

centralised scheme and you have to bear the share of the costs of the scheme in a proportionate way.

So it was directly, it was the equivalent scheme fees basically balancing scheme fees between two parties to the scheme.

MR TIDSWELL: You mean Budapest rather than *Cartes Bancaires*?

MR BEAL: No, that was *Cartes Bancaires*. *Budapest Bank* was aimed at a separate arrangement which was -- again it was trying to -- it was not actually within a single scheme, what they were trying to do was to harmonise rates between Visa and Mastercard, so two different schemes and the motivation seems to have been to stop the upward pressure on pricing that we otherwise see when these two schemes compete with each other in a way that leads to ever-increasing MIFs.

So you can see why the Court of Justice who had set their stall against MIFs in *Mastercard* was not adverse to the idea that if the national groupings are trying to find a way to restrict ever-increasing MIFs, which is a counter intuitive feature of competition between schemes, that would be a good thing.

So the other thing to bear in mind of course with *Budapest Bank* is that it was a reference and so actually the court does not say one way or the other whether it

is a restriction by object or not. What I can say categorically is they were not dealing with MIFs simpliciter and they were not dealing with Visa or Mastercard MIFs, so it was not a rerun of *Mastercard*. It was dealing with a response at domestic level in Hungary to the feature of interscheme competition which I have identified and therefore it needs to be read in that context.

So in my respectful submission, neither of those decisions support the proposition that the MIF is not a restriction by object because they are just not dealing with the same question. Hence the Supreme Court in *Sainsbury's* for example distinguished *Budapest Bank* saying it did not help Visa and we will see that the European Commission expressly addressed *Cartes Bancaires* in one of its regulatory decisions and I will come on to that in a moment and distinguished it. So that is paragraph 29.1 of my note. So that is where I will deal with it if you will allow me.

The final point on object in terms of the authorities before looking at the Commission's response is to call up, please, the *Royal Antwerp* case, {RC-Q3/63/16}, so again I went to this in opening. This was the challenge to the domestic and UEFA rules about the number of players who were home-grown players, so it

is the home-grown players rule.

But if we look at paragraph 95, there is a distinct aspect of restriction by object which relates to the compartmentalisation of the national markets at EU level.

Please would the Tribunal read 95 and then overleaf at 97. (Pause)

Thank you. That is support for the proposition that you can have a separate category of restriction by object which I think it is fair to say none of the economists really liked because it has its heart in EU law principles of a single market and anything that tries to prevent the single market achieving its aim by erecting artificial barriers on a national geographical basis is not a good thing and that is an EU concept rather than necessarily an economic concept.

Now, in terms of how the European Commission has dealt with object infringement, our submission is that in *Mastercard I* they were clearly edging towards a finding that it was an object infringement but did not need to go that far because they have definitively concluded that its effect was anti-competitive. Since then, however, there have been consistent expressions of view by the European Commission that the MIF is a restriction by object. With your permission I will go

through them very quickly because I have already been through a number of these with witnesses over the last four weeks or so.

First is the 2009 statement of objections to Visa, that is {RC-J4/22/87}. Starting at 247, we see the first four lines, MIFs typically set a floor which merchants must pay as an indication that Visa MIFs have by their very nature the potential for fixing prices. They are conceived as default interchange fees.

248, bottom of that page: the Commission is of the view that the Visa MIFs constitute a restriction by object.

However, given that it can be clearly established they have the effect -- we do not need to go further.

Then they go on to consider the effects at 249-251 and so on.

Next, please, the *Visa* commitments decision {RC-J5/14.8/6}. A short confirmation in Recital (21) of the reasoning we have just looked at:

"The Statement of Objections expressed a concern that the MIFs have as their object and they also have as their effect an appreciable restriction of competition ..."

They explain why that is the case and that mirrors many of the arguments we have already looked at.

Just foreshadowing for a submission I will be developing later, the Commission concludes that:

"The restrictive effect in the acquiring markets is further reinforced by the ... Honour All Cards Rule ... the No Discrimination Rule ... blending ... and [the] application of different MIFs to cross-border as opposed to domestic acquirers."

So they are relying upon the different scheme rules -- the anti-steering rules, as we have labelled them -- that collectively go to reinforce the anti-competitive effect of the MIF.

Next, please, {RC-J4/31/146}, we see that the 2012 supplemental statement of objections issued to Visa starting at (456) deals with object:

"The Commission is of the view that the change in the scope of the proceedings does not affect its analysis of whether Visa MIFs constitute a restriction of competition by object and will restate and amend its position [as] set out in the SO ..."

There is then quite a complicated and detailed analysis of the position until at Recital (481), page 152, {RC-J4/31/152} we see that conclusion is reached that it is indeed a restriction by object.

(481) says in terms:

"In the Commission's view it is obvious from the

above analysis that the Visa MIFs do have the object to restrict competition as they are capable of directly and substantially influencing the prices paid by customers and remove important uncertainties related to the operation of that market and thus restrict competition in the acquiring market. Accordingly Visa MIFs can be regarded, by their very nature, as being injurious to the proper functioning of the market."

That was then reflected in the second commitments decision, {RC-J5/20/7}, Recital (23). Again we see a similar conclusion to the previous commitments decision, the first commitments decision where they say they:

"... have as their object and also their effect an appreciable restriction of competition ..."

It is reinforced by the Honour All Cards Rule, the No Discrimination Rule, blending and the segmentation of the acquiring markets due to rules restricting cross-border acquiring.

Finally we move on to the inter-regionals decision, so the SSO, from August 2017 is at {RC-J4/80/71} is where there is a long, long section on object where the Commission fleshes out at Recitals (247) onwards the restriction of competition by object. I am going to cut to the chase, please, page 89, {RC-J4/80/71} Recital~(308):

"The Commission provisionally finds that Visa's rules on inter-regional MIFs amount to horizontal price fixing. The inter-regional MIFs fix a significant component of the price charged to merchants for acquiring services through the MSCs."

It arises -- see (309), (310), (311) -- from the very content of the Visa rules on inter-regional MIFs:

"... their objective is to fix a part of the price charged to merchants and to restrict competition to the benefit of Visa and its members/licensees (primarily the issuers) ... [it is] created by [the] rules ... is particularly severe and shows sufficient degree of harm to competition considering the legal and economic context in particular the reverse competition between the card schemes leading to higher MIFs and merchants' lack of bargaining power ..."

So that is the competitive problem in a nutshell that Mr Dryden addressed in his analysis. You have got the twin problems of reverse competition, the counter-intuitive competition as I have described it between issuers driving up MIFs. Then on the other hand merchants have no choice but to accept the MSCs that they are given, they have a fundamental lack of bargaining power and consequently a core component of the MSC is determined not by negotiation and the free

flow of market forces, but by the imposition of the MIF by the scheme.

That then finds root in the decision itself, the *Visa* inter-regional decision which is at {RC-J5/32/11} at Recitals (34) to (35). (34) sets out the findings that we have just looked at, gives an overall summary of the approach and in (35) the core reasoning is contained, refers to the preliminary conclusion that the rules have the effect of restricting competition and they determined a significant component of price charged to merchants for acquiring services through the MSC, thereby limiting the acquirers' scope for reducing and differentiating their MSCs and acquirers passed them on to merchants. Therefore MIFs have a direct impact.

So that is dealing with effect. (34) is dealing with price fixing being by its nature harmful to competition and revealing a sufficient degree of harm to the object.

So you have (34), object; (35), effect. But they are essentially relying, as we can see there, on the same broad propositions.

(35) does not involve an extensive data analysis of how a particular component is determined, it is simply following from the rules but it is saying that the impact of those rules is naturally to drive a reservation price or a floor for the MSC.

Now, that is all Visa. Could we please move on to two decisions in *Mastercard* which are to similar effect. The first is the statement of objections to Mastercard, {RC-J3/73/54}. Especially at Recitals (174) to (175), over the page, at page 55 {RC-J3/73/55}. Please would the Tribunal read (174) and (175). (Pause)

At (176) it says the inter-regional MIF is also similar to a recommended minimum price. Inter-regional MIFs apply in practice to all inter-regional transactions and fix an important costs component.

There is a footnoted reference at 196 at the bottom of the page to a series of cases said to establish a restriction. One of those is the *Verband* case that I took the Tribunal to a moment ago, so the recommendation in the insurance context for adopting a minimum approach to policy premiums.

Could we then please look at page 57 -- sorry, 56 {RC-J3/73/56}.

Recital (177):

"In conclusion, the Commission provisionally finds that it is evident from the very content of MasterCard's rules that the inter-regional MIFs fix a component ... That price component is common to all acquirers under the MasterCard scheme and hence restricts competition on price on the acquiring market."

It then deals with the objective and we see at (179) and (180) essentially the same arguments that have been advanced before this Tribunal. The objective is said to be address the imbalance, optimal delivery of services, compensation for services and so on, so all of the arguments that are being deployed here by Mastercard.

At (180):

"The Commission notes that MasterCard does not require or recommend issuers to use MIF revenues for any specific purpose ... the Commission does not consider that MasterCard has shown that the MIFs correspond to any service from issuers ... with respect to the payment guarantee ... there is no link between the level of the MIFs and the claimed service ..."

We then see at (181):

"Under these circumstances, the Commission's view is that the main objective of the MIFs can be assimilated to either fixing a part of the price to merchants or guaranteeing issuers certain minimum revenues from their card issuing businesses, irrespective of their individual costs ... The Commission considers that such a purpose to fix a part of the price to merchants and to guarantee issuers certain revenues is clearly anti-competitive ... [it is] to the benefit of MasterCard ..."

"Possibly [it says in Recital (182)] ... MasterCard may also claim that the inter-regional MIFs contribute to increased card use and the replacement of cash ... However, in this case the inter-regional MIFs restrict competition and allow MasterCard ... to jointly exploit market power in order to set part of the price and to guarantee issuers' certain revenues. In those circumstances the objective to increase card use at the same time aims at increasing such guaranteed revenues and must equally be considered anti-competitive."

At the bottom of the page there under Recital (184), last four lines:

"The Commission finds that the conclusions of [the *Cartes Bancaires*] judgment are limited to the very specific fee under scrutiny in that case and that the situation in the ... *Cartes Bancaires* judgment is not comparable to the present case."

So they distinguished the *Cartes Bancaires* decision by reference to its individual facts which they had set out earlier in that paragraph.

Then over the page, at the top of page 58, please, the third line down: {RC-J3/73/58}

"As explained above, the Commission finds that that objective is not legitimate and can be assimilated to the anti-competitive objective to fix prices in order to

guarantee issuers certain revenues. The Court of Justice's reasoning in ... *Cartes Bancaires* ... therefore does not apply to MasterCard's inter-regional MIFs."

Finally then please at page 64 -- sorry, not quite finally, we have Recital (202). {RC-J3/73/64} It refers to the Honour All Cards Rule and the reluctance or impossibility of merchants to steer consumers, that was said to contribute to the MIFs.

Then page 70, {RC-J3/73/70} the final conclusion that is reached at Recitals (225) to (228) is that there is a restriction by object. Please would the Tribunal read Recitals (225) and (226). (Pause)

THE PRESIDENT: Yes.

MR BEAL: This statement of objections was then followed by a settlement decision which was the *Mastercard Central Acquiring Rule* decision and therefore it is subject to the *AB Volvo* decision of Court of Appeal so that the recitals are binding for the purposes of the definitive settlement decision that was reached.

In relation to the Inter-regional decision, that is at {RC-J5/31/10} and much in a similar fashion to the previous decisions, the commitments decisions that have been reached, at Recitals (31) to (33), there is a neat summary of the preliminary views that were taken and the

preliminary view for example in Recital (33) was that there was a restriction by object and that it amounted to horizontal price fixing.

Now, since these decisions, we of course know that the prevalence of IC plus and IC plus plus contracts has only increased, we have had the evidence from the PSR as to the percentage of -- the high percentages of volume now of the card acquiring market in the UK that are reflected in IC plus plus contracts. Given IC plus plus contracts by definition pass on the MIF to the MSC, the case for finding an object is even stronger, we say, because you do not have to worry about: is it a blended rate, to what extent has it been passed on and so on. That issue is dead. We are dealing simply now with the natural consequence of the pricing structure in the market being that whatever MIF is set, it will be passed on to the merchant and the merchant will have to pay and it will be non-negotiated and that therefore we say serves to confirm that the object of the scheme is to fix a substantial part of a price on the acquiring services market which is non-negotiable and that is a restriction by object.

Now, it should not come as a surprise that the -- that is the effect namely that a finding by object is an appropriate outcome because coordinated price secting

dealing with a parameter of competition as important as price and leading to a non-negotiated outcome are the classic hallmarks of anti-competitive behaviour. So it is redolent of price fixing that the MIF is set in the way that the MIF now is, i.e. in the actual.

Of course the objective is to transfer a significant sum of money by way of subsidy from merchants to issuers; all of the witnesses accepted that that was the object. We have just seen that the Commission says that object is part and parcel of the analysis of why it is a restriction by object.

Those are my submissions in closing on restriction by object.

The third legal issue that separates the parties is whether or not -- well, it is really the question of the doctrine of ancillary restraint and whether or not something is objectively necessary for the main operation. In circumstances where the main operation is benign, you have an ancillary restraint that is paired in the main operation, there are aspects of the ancillary restraint that may restrict competition. To what extent can you ignore that restriction of competition on the basis that it is for the purpose of something that is intrinsically benign? That is the framework of analysis.

Could we go please to the International Skating Union case {RC-Q3/62/14}. Could we look, please, at paragraphs 102 -- sorry 109-112. I think I said 14. I think I gave myself the wrong reference there. It should be page 19, I am sorry {RC-Q3/62/19}.

Please would the Tribunal read 109 and 110. That deals with anti-competitive effect. (Pause)

THE PRESIDENT: Yes.

MR BEAL: Then moving on to 113 -- I am sorry, we should just in passing, please -- at 111, at the top of that page, there is a reference to a series of cases including *Wouters*, *Meca-Medina* and *OTOC*, etc. It is dealing with the ancillary restraint case law, in particular at the top of the page:

"Certain measures may be justified by the pursuit of one or more legitimate objective in the public interest which are not per se anti-competitive in nature.

"The second part of the test is the specific means used to pursue those objectives are genuinely necessary; and third, that, even if those means prove to have an inherent effect of, at the very least potentially restricting or distorting competition, that inherent effect does not go beyond what is necessary in particular by eliminating all competition."

So it is looking at the concept of ancillary

restraint by reference to, amongst others, the *Wouters* case law there and then it is plugging that case law into paragraph 113, saying:

"It does not apply in situations involving conduct which, far from merely having the inherent effect of restricting competition, at least potentially by limiting freedom of action, reveals a degree of harm that justifies a finding that it has as its very object the prevention, restriction or distortion of competition."

So that is in a sense saying if you find that the conduct in question restricts competition by object you do not move into the ancillary restraints analysis because you are immediately away from there because you have a problem with the arrangements in question. There is not a benign arrangement that you can attach the ancillary restraint to in such a way that the ancillary restraint can get brought into the overall analysis of the benign measure.

We see at 113 and 114 that:

"As regards conduct having as its object the prevention, restriction distortion of competition ..."

It is only at the 101(3) stage that you can look at the pros and cons of a particular measure. So the way that the analysis works is object versus effect. If

effect, you can then look at the concept of ancillary restraint and you may actually at the 101(1) stage be recognising that the overall effect of a benign measure with an intrinsically -- or something that might be restrictive as an ancillary restraint is legitimate, that is the objective necessity test, but if you found an object you do not get there, and it is therefore at the 101(3) stage that you have benefits and burdens.

There is a similar finding in the *European Superleague* case which I went to in opening and I do not propose to go through now. You have now had the *Wouters* case added to the bundle/that is at {RC-Q3/25.1/1}, starting at page 1. This was a case that involved a Dutch rule on the extent to which multi-disciplinary partnerships could pair accountants and lawyers together and the Dutch Bar Rules had set their stall against that happening because they thought that the legal practice should be kept separate.

If we could forward, please to the paragraphs of the judgment which start -- quite a long Advocate General's opinion -- the judgment proper begins at page 73, {RC-Q3/25.1/73}. Paragraph 2 there summarises the point I have just made that the Dutch Bar had a restriction on multi-disciplinary partnerships with accountants. The national legislation then is set over overleaf. The

court's analysis of how to deal with that particular restriction starts at paragraph 44 on page 82. {RC-Q3/25.1/82} First, it is looking at the question of who set the rules, are they an undertaking. The next issue at the next question is question 2 at page 86, {RC-Q3/25.1/86} looking at liberal professions, and so on.

The third question begins at page 92, {RC-Q3/25.1/92} looking at whether the Dutch Bar is an undertaking. Question 5 then is at -- sorry, questions 7, 8 and 9 are at page 93 {RC-Q3/25.1/93} and that starts to look then at the meat of the competition question. It refers, at 120, to cases such as *Walrave v Koch and Bosman*, looking at the rules that apply to sports associations when, for legitimate purposes, they try and impose rules on the conduct of the sport.

In essence what the court was looking at, therefore, was to what extent can you justify a particular measure on the basis that it is put in place for regulatory reasons in order to control the exercise of undertakings that are seeking to do something that the regulator does not really want them to do, whether from a free movement of services perspective or from a competition perspective.

That case admittedly has then been rolled out in

the sports law context, which is why the sports law cases have looked at it. So the case of *Meca-Medina*, which you do not have, for example, is an anti-doping case. The question was whether a sports association, the IOC, could put in place a ban on doping for athletes or whether that restricted their freedom of manoeuvre and therefore was anti-competitive. The court in *Meca-Medina* applied the *Wouters* case law and said where you have a regulatory measure that is aimed at the regulation of the professional aspects of either sport or, in this case, legal practice, that falls within the *Pronuptia* line of cases that is dealing with ancillary restraint in that sense.

So certain textbooks -- I have no doubt you will be referred to them by Mastercard -- like *Whish & Bailey*, for example, has this split between the concept of ancillary restraint that is commercial and an ancillary restraint that is professional or regulatory and the learned authors of *Whish & Bailey* suggest that they are two strands to the same line of cases. So most of these cases go back to *Romea*, *Pronuptia*, and so on. That deals with commercial ancillarity, so for example, a franchise agreement. When you have a franchise agreement the -- there will be certain core commitments that the franchisee has to abide by in order to

maintain, for example, brand image. So you will have to have a shop, if it is the Body Shop, they will have to have certain advertising, certain panels, carry certain products. Those are all things that in theory restrict the competitive freedom of the franchisee but they are necessary for the operation of a distribution agreement which operates through a franchise concept.

That is then rolled out through *Wouters* and *Meca-Medina* to a regulatory analysis whereby, if you have a rule of regulation that is, in theory, restrictive but pursues a legitimate public objective, it is to be equated with the ancillarity that you find at the commercial stage for franchisees, and so on, so you adopt the same framework of analysis for both strands of the case law.

So whilst, for example, academic treaties say, well, you can explain this line of case law in two different ways, they have a common route and the common route is that, yes, there is a modest restriction on the freedom of manoeuvre by a particular party, but it is done for very good reasons and for a legitimate purpose.

That is a rather convoluted way, I think, probably, of saying that objective necessity arises from a common root of case law and the sports law cases help explain what the test is and the test is that it has to be

impossible to maintain the main operation without the ancillary restraint being in place.

Now a MIF is a main parameter of competition, it is price, it is not ancillary, it is a restraint, but it is not an ancillary restraint, and Mastercard and Visa cannot point to a main operation which is benign which that ancillary restraint goes to support.

The MIF is a key parameter of the overall structure of the scheme and therefore this whole framework of analysis simply does not sit there.

PROFESSOR WATERSON: Mr Beal, I am not a lawyer, as you know, but could the Visa or Mastercard scheme be considered as a franchise scheme in any sense?

MR BEAL: No. No, I am afraid, is the short answer. The reason is it is providing payment services to people who are parties to the scheme in its own right, it is not seeking to pass on somebody else's product or have a route to market. It is -- a franchise arrangement involves a distribution of products from a central source via outlets. It is simply -- you can have an exclusive distribution outlet, you can have a non-exclusive distribution outlet, or you can have a franchised outlet. They are all means of getting a product to market. A payment method is a very different thing, these schemes are aimed at ensuring

merchants who sign up to the scheme via an acquirer get paid and a cardholder can use the card payment.

So two separate sides of a market leading to services being supplied to different people for different reasons, but no underlying connection to any underlying supply of goods or services other than as a means of payment.

PROFESSOR WATERSON: Thank you.

MR BEAL: The next bone of contention between us legally is the market-wide versus Mastercard/Visa transaction only counterfactual analysis.

Could we here please go to the *Mastercard I* decision, it is {RC-J5/11/118}. There is a series of recitals in the *Mastercard I* decision that confirm that the Commission was looking simply at the impact on Mastercard transactions in this case. So in Recital (412), halfway down the paragraph -- that is the *Mastercard II* decision, sorry. It should be {RC-J5/11/118}. I have mis-read, sorry, that is *Mastercard I*. It says:

"This finding is in line with the Commission's previous practice, but the collective decision relates to ..."

That is the key thing, in the third line:

"... charges by acquirers to merchants for acquiring

cross-border credit and debit transactions with Mastercard payment cards."

So that was the focus. We then see, please, page 120, Recital (419). The focus is on Mastercard-branded credit and charge cards in domestic payment transactions. At page 122, {RC-J5/11/122}, Recital (428), the diagram in question was looking at Mastercard-branded credit and charge cards of acquirers. The data was therefore going to -- we can see four lines up from the bottom:

"The fallback interchange fees are the Mastercard-branded credit and charge cards."

So all of the data was geared towards that in terms of the quantitative analysis.

Page 124, {RC-J5/11/124} Recital (430). Again, the relevant analysis was at the stage of the Mastercard brand, weighted average was by reference to the Mastercard brand, and it was looking at the average merchant fee for Mastercard-branded payment cards. So the focus was all on the Mastercard cards and not any other payment method or indeed any other scheme's card.

It is in that context at Recital (448), page 130, {RC-J5/11/130} that we have the one line that is otherwise seized and taken out of context by the defendants' expert. That one line is:

"The decisive question is whether in the absence of the MIF the prices acquirers charged to merchants at large would be lower."

But that is all in the context of prices charged for Mastercard transactions. So in context that is not saying you suddenly divert to an analysis of the broader payment card structure or indeed other payment instruments beyond payment cards themselves. You are simply looking at, in the counterfactual: remove the MIFs that are payable for Mastercard and Visa transactions; are the costs of those transactions lower? If the answer is yes then you have an established restriction of competition and that is a very straightforward analysis.

By the way, it is the analysis that was done in *Sainsbury's* in the Court of Appeal and *Sainsbury's* in the Supreme Court. The suggestion that you suddenly pivot at this point and say, well, the focus has all been on Mastercard and Visa's cards but we are now going to consider how much it would cost for example to use Faster Payments in the event that everyone switches to Faster Payments rather than payment cards is simply no part of the Article 101(1) analysis.

If that comes in at all, question mark, it is at the 101(3) stage.

MR TIDSWELL: This is a variant of the first disagreement, is it not? I can see it may not be precisely put the same way but it is effectively -- if you are right about the split between 101(1) and 101(3) then you would say if it follows you are right about this as well; is that right?

MR BEAL: I think this is a subset. I mean it leads to the same conclusion which is what is the division between 101(1) and 101(3) and we say the natural outlet for a concern about this is therefore you pivot to 101(3) analysis.

But there is a purist point here which is what is the counterfactual meant to consider? So if the factual that you are considering is Mastercard and Visa transactions and the effect of the MIF what you cannot do in the counterfactual, we suggest, is broaden the enquiry, have a different market, a broader product market, other payment methods beyond Mastercard and Visa because then you are not comparing like with like between factual and counterfactual.

MR TIDSWELL: Yes, because I think the way that it evolved with the discussions with the experts it was put as being part of the effects analysis.

MR BEAL: Yes.

MR TIDSWELL: But actually when one pressed on that, then

the question became: Well, are you actually trying to bring benefits in and an overall assessment of the anti-competitive effect? Then of course you get into a 101(3) split.

MR BEAL: Yes. I mean, the idea that you look at switching was based on, well, if you do not look at switching you are not taking into account the consequential impacts on other aspects of different markets.

So the answer the experts gave as to why it was appropriate to pivot from factual to counterfactual and broaden the counterfactual analysis was said to be system wide to which the answer then becomes, you are quite right, issue 1) which is at what stage do you look at the broader effects on broader markets question?

MR TIDSWELL: Yes. Thank you.

MR BEAL: The fifth and final, from my perspective, point of disagreement that I am going to deal with is simply what is the impact of the relevant Commission decisions that we have looked at including both settlement and commitments decisions.

I think I can deal with this pretty briefly on the basis that I spent quite a lot of my opening dealing with this. So page 13 of my note, if I could just go please without necessarily looking at the individual cases, if I can just go by some propositions of law that

I have extrapolated. Firstly, *AB Volvo v Ryder* I went through in detail in opening. The conclusion that was reached there by Lady Justice Rose was where you have a settlements decision, and that is a term of art, it is where you offer a settlement, the settlement is accepted and it leads to a finding of an infringement, all of the recitals are binding on the party to that settlement because it is not appropriate, having accepted the statement of objections for the purposes of reaching a settled agreement, a settled decision, it is not appropriate for that party to seek to go behind the statement of objections.

Now, there is a settlement agreement here. It is the *Mastercard* CAR decision dealing with the duration of an infringement for maintaining the cross-border acquiring rule from February 2014 through to December 2015 and Mastercard has accepted that that decision is binding on it and it does not seek to go behind it. So that is the *AB Volvo* analysis, how it plugs into the *Mastercard* CAR decision. Of course it also plugs into the *Mastercard I* decision, but the *Mastercard I* decision for intra-EEA MIF and domestic MIFs through to 2015 is already the subject matter of the *Dune* summary judgment finding so, therefore, not relevant for Trial 1 because it has been determined.

The second issue concerns commitment decisions. I finally learned how to say "*Gasorba*" rather than mispronounce it, as I did in opening. But the propositions from *Gasorba* are that firstly commitments decisions do not certify compliance with article 101(1), so it is open to a national court to find a breach of article 101(1); no legitimate expectation is created by that decision so you cannot say: We have got a commitments decision, therefore we are in the clear; and, finally, at paragraph 29, you cannot overlook the decision you can take it as an indication or prima facie evidence of breach of article 101(1).

Now, as I explained in opening, that analysis has moved on slightly in the *Canal +* decision, which we come to next and I went through that again in opening. The core argument was we have given this commitments decision, the consequence of that is that *Canal +* found that its commercial latitude had been impeded because it was not able to enforce the existing contract that it had had in the way that it thought it could. The objection to that was that the Commission had not taken into account the consequential effects of the commitments decision on *Canal +* and therefore the decision was annulled on that basis. It is a straightforward failure to take into account adverse

consequences for a non-party to the decision.

However, the court went on to analyse what the interplay was between a national courts ruling in relation to a commitments decision and the commitments decision itself and the propositions are then set out at the top of page 14 of my note. It was true that a national court could declare an agreement void even if a commitments decision had been issued, but it could not more generally issue a decision running counter to the commitments decision, a national court decision requiring an entity to breach its commitments would do that.

So if a national court says: You must take steps to do something and that something necessarily involves a breach of the commitments decision, that goes beyond the competence of what a national court can do. The national court could not require conduct which would put the party in breach of its commitments. Therefore, the national court, while it could find that conduct was indeed anti-competitive, could not give a form of negative clearance in respect of a decision that was subject to a commitments decision and then national court finally could not declare that the clauses in the agreement did not infringe article 101(1).

It is those last two paragraphs, 113 and 114, which

we say are key. It might be worth just having a quick look at those it is {RC-Q3/58/18}. So that is my attempt to distil the summary of the propositions in this case. But if we look specifically at 113 and 114, the Tribunal will see the meat of the reasoning of the court for those two propositions. (Pause)

So what are the options available to a national court or indeed this national Tribunal? Well, in the face of the commitments decision it is perfectly open to you to find that there is in fact infringing conduct infringing 101(1) because that is of a piece with a commitments decision. Why? Because by giving commitments and having them accepted you are recognising that there is a competition concern that has been articulated in the statement of objections, that the Commission is entitled to have those concerns and you are seeking to solve the problem by the commitments you offer and by accepting those commitments the Commission is saying: We recognise that the concerns we have from a competition perspective are to our -- not to our satisfaction but they are tolerably solved by the commitments you have offered so finding that there is an infringement of article 101(1) is consistent with that.

If the commitment, for example, is as to a particular level of a price, if a national court were

to say a price higher than that is acceptable, then that would run counter to the commitments decision. So if the commitment says you cannot charge more than 0.3% or 0.2% for credit transactions, debit transactions, then a finding by a national court that it was appropriate for the undertaking nonetheless to charge 0.5% and 1% for example for debit and credit would run counter to the commitments that have been given and to the commitments decision.

Conversely, a finding that there is no competition concern at all would also, with respect, run counter to the commitments decision because it would be suggesting that the commitments had not been validly given in the first place.

So we see in 114 the court could not reach a conclusion that the relevant clauses do not infringe article 101(1) and therefore that was something that it was not open to the national court to reach and the reason why that was relevant was the General Court had suggested there is no problem with whatever the national court has done because ultimately the national court can always rule there is not a problem with article 101(1). Answer: no, that is not right.

So the freedom of manoeuvre is constrained by the commitments decision, I accept, for so long as the

Commission may still re-open the proceedings. Once the commission -- the duration of the commitments decision is done it seems to me, with respect, that we move from something that binds this national court to something that the national court should take in to account as part of the historical position because the conflict of competence does not arise because it is no longer an active commitments decision that would otherwise tie the court's hands.

I hope that explains how we view these matters.

There is significant further detail in section G6 of our written closing. Those deal with a number of points that are raised by the schemes in their opening submissions, which we did not have a chance to reply to. That starts really at paragraph 355, page 210 of our written closing, which is in the new bundle {RC-S/1/210}. Again, it is probably quickest if the Tribunal would be kind enough to read through to the bottom of page 212. (Pause)

Two further short points, if I may. Firstly, the existing commitments decisions that are still in effect; namely, the *2019 Commitments* decisions, the effect of those has been preserved by the EU UK withdrawal Agreement and they are still binding on the parties to them, namely the schemes.

Secondly, the overarching fall-back position under section 60A is that these Commission decisions in their various permutations can be relied upon for persuasive effect by this Tribunal in appropriate circumstances and given the long regulatory history and the Commission's serious and detailed involvement with the question of MIFs, we would commend those decisions to you. That is it on the law.

I am now going to go, with your permission, through the issues one by one.

Issue 1 is effectively the market definition question. I have set out the specific question at the bottom of page 14. What are the relevant product markets? What is the geographic market? Common ground: the geographic market is national in character. Product market, we say, is the acquiring services market.

If one looks at the formal list of issues, the formal definition is: a single acquiring market in which acquirers compete to supply services to merchants.

True it is that there are the two-sided aspects of the payment platform that we have explored in detail. But if one adopts the Comparethemarket style analysis of the focal product, the focal product here is the acquiring services provided by merchant acquirers to merchants. What is the price in the market? MSC. What

is the restriction in the market? It is the fact that the MIF necessarily sets a core component of the price in the market, the MSC, in a non-negotiated fashion.

The Commission in *Mastercard*, and I have provided the recital at paragraph 41, found that cash, direct debits and cheques were not in the same product market and it found that the relevant product market for *Mastercard I* was the market for acquiring payment cards.

We have seen that acquiring payment cards in this case involves Mastercard and Visa. There is a question about Amex because Amex is not acquiring Mastercard and Visa cards, but Mr Dryden and Dr Frankel proceeded on the basis that Amex cards were part of the same market regardless of a formalistic definition and we are happy to live with that so long as it is recognised, of course, that an acquirer cannot offer Amex cards without Amex's permission and typically the way that that is dealt with is through the payment facilitator arrangement rather than through a merchant acquiring relationship.

But again we have no desire to be excessively formulistic. It seems to us that if one were being purist and it mattered one would split off Amex from the relevant focal product because it does not form part of the same competing services, but we see no need to do

that in the circumstances of this case.

Now, in terms of the geographic market as I have said it is agreed to be national in scope. The consequence of this is that we are advancing the same product market and the same geographic market that was considered in Mastercard and that makes good sense because, why can you have summary judgment, for example, on intra-EEA and domestic MIFs pre-December 2015 for one market as we do and then suddenly switch post-December 2015 to a totally different market or a different product market? That would not make any sense.

So there is no logical or economic reason to switch the formal market definition just because a regulatory measure like the interchange fee regulation has come in.

The formal definition for the market is accordingly the market for merchant acquiring services in 1) the UK and 2) the Republic of Ireland. As I have said, the price in that market is the MSC and the restriction of competition is the coordinated setting of a substantial component of that price. That price is coordinated because it is not freely negotiated between the independent parties in that market.

We do say, having identified the market, it is important that the counterfactual market is the same and

you have got my submission already that you cannot simply broaden either the geographic or the product market to make that different. That is all we have to say on issue 1.

Issue 2 is at the top of page 16 and it relates to effectively who sets the MIF. Our primary submission on this is this had much greater relevance before the *Dune* CAT decision and the Court of Appeal's decision in *Dune*. In each case, the Visa defendants either set the MIF or set the scheme rules and implemented those scheme rules in the relevant market and that is sufficient to bring them within scope.

In relation to Mastercard, the short point with Mastercard is since the IPO in 2006, Mastercard has set everything. It does the rules, the rates, everything. So it is a very straightforward analysis.

The IPO arguments, namely: because we are an IPO and we do all this as an IPO, as an individual entity, we are not an association of undertakings has been rejected. It is rejected in *Dune* and that is why *Dune* basically makes this much narrower point than it was otherwise going to be.

Now, there is a specific argument that has been advanced by Visa in its opening which was, to some extent, supported by Mr Butler's witness evidence. The

argument goes as follows: some claimants, not all of them, have not sued Visa Inc, Visa Inc sets the inter-regional MIF, Visa Europe cannot do anything about the rate that Visa Inc sets and, therefore, if you have not sued Visa Inc there is no way in which you can get relief against Visa Europe to ensure that the inter-regional MIF is removed from the transaction.

With respect, that was always a thoroughly bad point. It implied that Visa Inc would be prepared to ignore the CAT's ruling on inter-regional MIFs and proceed to continue to set them even though they are unlawful.

On the facts, Mr Knupp and Mr Butler both readily accepted that Visa Inc would simply have directed the Visa Europe scheme to be operated in a way that complied with local law. So if this Tribunal rules, as we submit it should, that the inter-regional MIFs are unlawful Visa Inc would have directed Visa Europe to ensure that inter-regional MIFs were not charged and did not therefore form a basis for the Merchant Service Charges for those transactions.

We do say that that was an inevitable conclusion looking at the very scheme rules. Those scheme rules I will address, if I may, after the short adjournment rather than turn to them now. I do not have time in two

minutes, I think, to do them justice.

So if that is a convenient moment. In terms of where we are, page 17/41-ish, so making very good progress.

THE PRESIDENT: I am very grateful. In that case, we will resume at 2 o'clock, Mr Beal.

(12.58 pm)

(The short adjournment)

(2.03 pm)

Discussion re housekeeping

THE PRESIDENT: Mr Beal, good afternoon.

MR BEAL: Good afternoon, sir.

Please can we pull up the transcript from Day 17, page 239 {Day17/239}. I am raising something, sir, out of turn. It is a timetabling issue.

THE PRESIDENT: Good. When you have done that I have something to raise out of turn myself arising out of a letter we received from the parties, but do go on.

MR BEAL: Thank you.

The reason I am raising this now is because, being blunt, I am quite cross about it. {Day 17/239}, top of page 238, you, sir, raised the issue of timetabling and whether we should start Thursday afternoon or Friday morning.

THE PRESIDENT: Yes.

MR BEAL: I said that I had spoken, as I had, to my learned friends about this and we preferred a Friday morning start because that gave me the time, and how we have needed it, in order to prepare the closing submissions. That then, on the basis of discussions that we had had, gave me a day and a half for closing, so I was pulling my oral submissions for closing back to a day and a half and the quid pro quo would be the defendants would have a day and a half as well.

THE PRESIDENT: Yes.

MR BEAL: I would then have half a day for reply. I was hoping I would need two and a half hours rather than sitting extended hours that day and that remains the case.

That was predicated on a number of things. Firstly, Ms Tolaney had already indicated to me she was not available in the afternoon of 28 March and therefore I anticipated that that was acceptable. Secondly, as the transcript records at page 239 over to 240, Mr Kennelly was amenable to the suggestion and we both agreed that we would cut our cloth accordingly, the expression used at page 239 --

THE PRESIDENT: Yes.

MR BEAL: -- and there was no demur at that stage from Mastercard at all.

This morning, Mr Cook mentioned for the first time that, in his view, we would be sitting Thursday afternoon, which was not previously what the parties had understood, and that accordingly I would have a day and a half, but the defendants would now suddenly get two days which, of course, does not represent a fair allocation of time for closing, consistently with what we had previously agreed.

Obviously I have cut my cloth accordingly.

THE PRESIDENT: Yes.

MR BEAL: The 41 or 42 page document is the product of that cloth being cut. Once I have finished with this document, I still wanted to go through aspects of the closing that deal with the evidential matters and the factual findings that we specifically invite the Tribunal to make, but I anticipate I can do that simply by reference to the written closing and it will take maybe an hour, tops, on Tuesday morning, but I need to finish this note first.

If, however, I had been told that I would have more than a day and a half I would have drafted an aide memoire that reflected the time I thought I had because I have been quite assiduous to try to stick to times where possible. Counsels' time estimates are not 100% reliable but I have tried to meet the time I have

been allotted as far as I can; that includes in opening, in expert cross-examination, and in cross-examination of the witnesses, where possible.

To suddenly find that the parameters and goalposts are being moved this morning was therefore, I am afraid, annoying, I am going to be blunt about it. To find that my learned friend had unilaterally approached the registry to see whether or not the Tribunal could accommodate Friday afternoon --

THE PRESIDENT: That explains something that -- yes, I see.

MR BEAL: -- is, with respect, completely out of order, especially in circumstances where Mr Kennelly and I are agreed as to the allocation. Mr Draper was here at the time of that allocation being agreed and said nothing. Mr Cook now wants to have longer. I am going to let him explain why he thinks that is appropriate.

MR COOK: Sir, I am very surprised by this. What I have taken from the transcript is there was an exchange about whether we should start on Thursday afternoon or Friday morning. What you said, sir, was if we started on Thursday afternoon there will be nine half days, four and a half days; if we started Friday morning there would be eight half days, four days. That is what simply I had taken from that transcript, that you were saying -- and obviously there has been a cancellation of

the CMC on Thursday afternoon, specifically to free up Thursday afternoon. So my understanding from the transcript was that the Tribunal had, and you, sir, had expressly said there were four days.

Mr Beal asked -- in that exchange this morning indicated he thought we were not sitting Thursday afternoon. I simply asked the Registrar whether the Tribunal was presently sitting Thursday afternoon or not. That was the situation, sir: I am simply clarifying. My understanding of the transcript is you said we had eight half days which takes us through sitting Thursday afternoon. If that is not the plan, that is obviously fine --

THE PRESIDENT: I think the thinking and the reason Mr Beal is troubled is he is keen to end, as we began, the parity of arms in terms of time allocated. I think that is all he is saying.

MR COOK: Well, and what he is suggesting currently is he gets a day and a half and half a day, so two days, and then obviously the parity would then be we got two days.

THE PRESIDENT: Is that what you actually need, Mr Cook?

MR COOK: Firstly, I am just simply clarifying whether presently the timetable was on that basis. Sir, I would hope that we will be done earlier --

THE PRESIDENT: Mr Cook, the fact is --

MR COOK: -- but I am just clarifying what the position is at the moment.

THE PRESIDENT: The discussion about the number of half days preceded, rather than succeeded, the point about timing. So let us not get too hung up about what is going on there.

My understanding was that it would be a day and a half with a sweep-up after that. If that is something which you cannot live with, because a fair articulation of your closing requires more, I am not sure why that should be the case but if that is the case, then of course we will hear you. But it is not how things were left last week.

So why do we not move on to other things of substance and please just work out what it is that is needed. We have been, I think appropriately, indulgent of those cases where cross-examination has overrun, because we do not want substance to be cut out, but I do not really like the sense that just because there is time it should be used up. The fact is all of us have a great many other things to be doing. I have a large number of judgments which need to be written. I will give this case the appropriate amount of time and I expect the parties to focus on that first, not on what time is available primarily, so perhaps we can leave it

at that. Perhaps you can have a think about what is needed.

MR KENNELLY: Sorry, sir, just to be clear, I stand by what I said on Day 17 as Mr Beal faithfully recorded.

THE PRESIDENT: Indeed. I think the problem is Mr Cook was not there and he has read what is on paper perhaps rather differently to the sense that one got orally. It just goes to show that transcription, however brilliantly done, does not quite get the nuance or atmosphere of the room. Mr Kennelly, I do not think there is any criticism of you and I do not want to really get to the heat on this. Let us work out what is a fair and proper process, not what is an extraction of, as it were, every minute of what is available. Let us see what is needed.

The point, before we go on to other things, is we got a letter from Linklaters yesterday referring to various materials: Mr Stokes's second witness statement, Mr Korn's third witness statement and Mr Holt's report responding to Frankel's and requesting the Tribunal's permission to rely on those statements and that report. Now, my understanding is that is not a proper --

MR BEAL: I thought that had been approved.

THE PRESIDENT: I thought it had been as well.

MR BEAL: I suspect what they are after is a formal

communication in writing from the Tribunal confirming that that permission was granted.

MR KENNELLY: If necessary, sir --

THE PRESIDENT: I do not think it is necessary. It is on the transcript, but it goes in on the basis that we want more in, rather than less, and, as with everything, we will look at it through the lens of weight because, of course, things that come in late you have not got enough time to respond to and that is our approach. I mean, fairness is what we are in the business of looking at.

So if that is enough of an indication then we will leave it there.

MR KENNELLY: That is more than sufficient, thank you, sir.

THE PRESIDENT: Mr Beal.

Closing submissions by MR BEAL (continued)

MR BEAL: Thank you very much.

Please could we return to the top of page 17 of my note and pull up from the bundle {RC-J4/89.2/65}. So this is parts of the Visa scheme rules and we see that clause 1.1.3 deals with compliance with laws and regulations. It says:

"Each member must comply with all applicable laws and other legal requirements."

We see further down that clause, the next paragraph:

"A transaction must be legal in both the

cardholder's jurisdiction and the merchant outlet's jurisdiction."

So it was always going to be the case that a finding of illegality in relation to an inter-regional MIF would have to be respected both from the issuer of that card and the merchant that was receiving it via an acquirer.

Moreover, if we look at clause 1.1.8.1 at page 80:

"Each member is solely responsible for its issuance of Visa products and acquiring of merchants to accept Visa products, including responsibility for settlement and for complying with all applicable legal and regulatory requirements."

So again issuers are duty-bound to respect the applicable legal and regulatory requirements including in the issuing jurisdiction and the cardholder's jurisdiction -- or the jurisdiction of the transaction, I should say.

Finally, at {RC-J4/22/29}, part of the statement of objections to Visa in 2009 confirms, in Recitals (50) and (51), that a framework agreement was regulating the relationship between Visa Inc and Visa Europe and that framework agreement, in Recital (51), confers an exclusive licence to operate the Visa payment card system:

"As set out in the framework agreement, Visa Europe

is entitled to deviate from the global rules only if it determines in good faith and notifies Visa Inc in writing that they are not in compliance with applicable law."

So all of these routes would inevitably have compelled Visa Inc and members of the Visa system more generally to respect any order that this Tribunal might make as to the legality of the inter-regional transactions and that is a perfectly sensible scheme. It is what one would expect from a law-abiding multinational organisation operating globally around the world, so not surprising.

What arguably is more surprising is the suggestion that the contrary might hold good.

Can I then please come down to deal with issue 2.2.3. Happily, and I do not think we need to turn this document up, that is no longer in issue. As of September 2023, one sees that Visa and the SSH claimants were agreed that the resolution of the *Dune* Court of Appeal judgment was such that that particular issue no longer applied.

So ticking through the issues under issue 2, that deals with issue 2.2 in its entirety.

The answer is that, for the reasons we have given, the fact that the inter-regional MIF is determined

unilaterally by Visa Inc, and we accept that it seems to be, does not shift the dial in terms of the analysis from a competition perspective.

Moving on to issue 2.4, I am going to deal with that when we come to issue 7.2 because in fact it is exactly the same issue. It is to do with the role of the Delaware corporation, Visa Europe Services Inc, which became Visa Europe Services LLP. It is a discrete issue. It involves a series of board minutes that we went through with Mr Butler when he was giving his evidence, but I can deal with it more conveniently at issue 7.2.

Issue 2.6 is: when did Mastercard start setting MIFs? Subject to the *Volvo* limitation issue, which is on appeal, but for present purposes we have to assume it is irrelevant. The reality is that all of the relevant MIFs have been set by Mastercard since its IPO in 2006 and the consequence of that is it does not actually matter who is liable for setting the MIFs prior to that date, which is the only point in time at which factually it becomes relevant, if in due course that has to --

MR COOK: Can I just clarify there was a point raised in opening about Maestro and we tried to resolve it in correspondence and it has not been. It would be helpful to know if it is still in issue or not on this point.

MR BEAL: My understanding was that the Maestro decision-making was pre-2006.

MR COOK: No, it is up until 2009.

MR BEAL: I think the issue is whether or not the Maestro claims are within the scope of the existing pleading. I may have to come back to you on that after the transcriber break.

THE PRESIDENT: Of course.

MR BEAL: I do not immediately at the forefront of the cortex have the answer.

MR COOK: It is not a big point but it is helpful to know if the Tribunal needs to decide on it.

MR BEAL: I recall correspondence being exchanged. I am afraid I simply cannot remember what the outcome of the correspondence was. If it helps, I remember thinking I put it in the box marked "that is not a problem for now", but that needs to be given a more concrete form.

We had not understood in Mastercard's opening that it was being covered but I do remember some correspondence arising subsequently, so I will come back to you on that.

Issue 2.7 is then whether Visa's inter-regional MIFs or Visa's other MIFs after 21 June were not collectively determined. The answer to that has also been given in correspondence by the 11 September 2023 letter which is,

following the judgment of the Court of Appeal in the *Dune* group case, it does not matter who specifically set the MIF, it is the fact that they were collectively determined by the scheme which is operated by an association of undertakings. So the fact that it was Visa Inc or not Visa Inc that set it pre or post the one Visa transaction in 2016, answer: not relevant.

That brings me on to issue 3 which is going to take a little longer. Issue 3, obviously as the Tribunal is well aware, is the counterfactual -- it essentially resolves to the issue of what is the appropriate counterfactual for the post-IFR period. This issue raises a number of questions but the summary of our answers is given at page 18, paragraph 54. We say that the essential factual analysis set out in paragraph 93 of the Supreme Court judgment is still the applicable one.

The relevant counterfactual, consistently with that, should be default settlement at par, which can also be characterised as a prohibition of ex-post pricing. The answer to issue 3.1.1 is therefore no, i.e. nothing materially has changed from the Supreme Court essential facts, and therefore the remaining issues in 3.1.3 do not arise.

In any event we say to the extent that the setting

of the IFR makes any material difference, which we say it does not, the appropriate counterfactual remains default settlement at par and not either of the two counterfactuals contended for by Visa and Mastercard.

I am proposing to deal with thematically rather than necessarily by reference to the individual issues. The first question in a nutshell is: is the settlement -- sorry, the counterfactual of default settlement at par one that is viable and realistic? We say that the answer to that question is clearly yes. That counterfactual received its imprimatur in the Supreme Court's analysis in *Sainsbury's*, it echoes the findings of the European Commission in *Mastercard I*. The *Mastercard I* reasoning was upheld by the General Court and the Court of Justice in Luxembourg and, therefore, at face value it is a perfectly sensible approach. It is also, of course, the way in which other payment systems operate and the Tribunal now has fully before it the extended evidence available for the ability of a four-party payment system to operate for significant periods of time with no MIF in place.

The question then becomes: how do you deal with that counterfactual? Well, following the *Société Technique Minière* case, it is trite that you strip out the infringing aspect of the agreement, remove that for the

purposes of the thought experiment, that is the counterfactual analysis, strip out the bit of the agreement that you say restricts competition. What are the consequences? Well, here if we strip out default MIF, you simply have a payment system that will clear and settle transactions. That clearing and settlement process will lead to the transfer of money by way of payment for the underlying transaction, and there will be no deduction from the money that is transferred by way of payment. That is what default settlement is.

The consequence of that default settlement is that no MIFs will be charged to the merchant as part of the Merchant Service Charge and therefore ex hypothesi you are paying lower MSCs and that therefore confirms -- it has been suggested against me that this is somehow a circular argument. It is not. It is just the natural consequence of removing a price that is determined on an anti-competitive basis as to a substantial component. Remove that substantial component and you have a freely negotiated price, not including the MIF, and that price will be lower. So QED .

This is a slightly more tendentious topic, which is the role of the interchange fee regulation. The problem with simply accepting at face value that the interchange fee regulation is part and parcel of the landscape and

therefore must be taken into account is that it gives rise to a circularity.

As I understand it, although I have not been through the detail yet, it is accepted by Visa in its closing submissions that the IFR is not a competition decision. I mean, on its face it is clearly not. Recital (14), as the Tribunal is well aware, confirms it is without prejudice to the competition position and therefore you can still have, as we have here, national enforcement, either private enforcement or NCA enforcement, dealing with the competition position.

It is a regulatory measure that caps interchange fees within the EEA to certain rates for intra-EEA MIFs and domestic MIFs and what it does is it sets a cap beyond which those weighted average rates cannot go.

What we say this does is it constrains the exercise of market power, it does not remove it altogether, so it is not changing the underlying dynamics of the market, it is not changing the underlying mechanics of the MIF. It is simply saying: you will exercise market power, you will have an upwards-only incentive on the issuing side that produces positive MIFs for the acquiring side, but thus far can you go and no further. So it contains the exercise of that market power.

THE PRESIDENT: It does not legitimize it; is that right?

MR BEAL: It does not legitimise it and it does not remove it. It is not an exemption decision. It is not saying this is legitimate.

The schemes rely on various indications of a merchant indifference test being applied. That was used as a proxy for determining whether 0.2% and 0.3% were viable, i.e. are they a sensible meaningful cap. They were not suggesting that they were the prevailing price in the market because it used the wording of the cap. As I put to Dr Niels, I think it was, imagine you have a regulatory regime that places a cap on things, like the cap on the price that can be charged for payday lending, which is a recent cap that has been introduced. If payday lenders nonetheless collusively collaborate to set a price below the cap but above what might otherwise arise from competitive negotiation between lenders and borrowers in the market, that still is an infringement of competition law. The fact that the cap might encourage people to think it is fine to price up to the cap does not prevent it being an infringement of competition law.

So the position we end up in is this is not a competition measure, it was not intended to remove the problem of market power. It was intended to constrain its exercise to a certain level for, predominantly,

consumer objectives to deal with the diversified approach to MIFs and to the excessive MIFs that were being found in the market. The rationale for the measure we can actually see at {RC-J5/18/28} and this neatly identifies the problem it was trying to tackle.

Under the section "Interchange fees" it says:

"Interchange fees lead to much higher costs to merchants and ultimately their customers."

That tells you what the objective is: they want to have lower costs for merchants and ultimately lower costs for customers in the long-run.

"Any efficiencies they generate do not appear to justify these costs, at least at the current IF levels. IFs also constitute an obstacle to market integration. These negative IF effects are reinforced by a number of business rules which reduce transparency, limit the ability of retailers to steer their customers towards more efficient means of payment, and the ability of retailers to choose an acquirer in another Member State."

Again focusing on the steering rules, which are also part and parcel of the rules that are targeted by the IFR in due course.

Then it says:

"The lack of a level playing field persists in spite

of the many national and European competition proceedings."

So the concern was private enforcement and even regulatory enforcement at national level is not producing an answer. Fragmented competition law enforcement may even lead to further legal uncertainties and a reduction of IFs by all market players would be the most appropriate way to ensure a competitive market. That is aiming to effectively deal with the problem on a one-size-fits-all basis. It is not saying this is the cure; it is saying this will go some way, as it has, to redressing the imbalance between the issuing side of the market and the acquiring side of the market and the excessive IFs that get generated as a result.

So the problem with including the IFR in any counterfactual analysis -- it is in a sense a partial response to a competitive problem and we recognise that but it leads to a circularity. If the only reason for the IFR being introduced is the very market power problem that we are trying to isolate and identify and cure, then the fact that it has gone some way to cure the problem means that we are ironically worse off if the IFR is included than we would have been if there had not been a partial response to the competitive problem.

If we had simply sued in 2014 and the hearing had

been heard per impossibile within six months of issue before the IFR were in place, on this analysis it would not have been open to the schemes to pray in aid the IFR and therefore they could not have run the alternative counterfactuals. Post-2015 it suddenly becomes available to them to pray in aid the IFR simply because it has been introduced and has produced a partial response to the competitive problem. If the result of that is that you simply ignore the underlying mechanics and the underlying problem, competitive problem, at source, then you are assuming away a problem and assuming it does not exist in circumstances where that would be quite wrong, and so the circularity is difficult.

Happily it is not just our side and our team that think this, it is also the Court of Appeal in the *Hutchison 3G* case. Please could we look at that. It starts at {RC-Q2/4.1/16}. If we pick it up at page 16. This is quite a complicated regulatory decision that my learned friend Mr Kennelly was then a junior in, so no doubt if I get something wrong on the factual framework he will correct me, but it essentially involves end-to-end connectivity between mobile call termination centres -- it is part of the *MCT* litigation that the Tribunal is very familiar with.

THE PRESIDENT: Yes.

MR BEAL: BT obviously was paying prices for calls terminating on the individual MNOs' networks and the issue was to what extent can you look at the regulatory scheme governing both BT and the MNOs in order to determine whether or not those MNOs had significant market power?

If we pick it up please at page 16, paragraph 39, we see that the appeal was brought on three separate grounds. The first turned on the end-to-end obligation under which BT could not lawfully be required to pay a price appreciably above the competitive level. So it was said H3G is not able to act independently of BT and does not have significant market power.

Because of some constraining obligations as a regulatory matter on the price that could lawfully be charged, H3G was saying, hold on, if we try and charge more for mobile call termination than is the competitive level, BT will essentially enter into a dispute process with us and insist on that price being brought down to the competitive level as part of the price regulation that was brought into the market to deal with significant market power, SMP's.

The second ground was that the Tribunal was wrong to hold that Ofcom's dispute resolution powers should be

disregarded when considering whether H3G had SMP.

Just unpacking that a little, the CAT had assumed it was appropriate to look at the end-to-end obligation because it was a regulatory aspect of the market which was pertinent for determining the relationship between the parties. But then they refused to take into account the fact that you could in theory have resort to a dispute resolution process with Ofcom if you did not like the price you were paying.

The reasoning for that distinction becomes apparent when we look at the approach of Lord Justice Lloyd in particular, starting at page 24, paragraph 53. Please could I invite you to read that paragraph. It deals with the modified *Greenfield* approach. A Greenfield approach, which depending on -- the outcome of which depended on which particular regulatory constraints you took into account. (Pause)

THE PRESIDENT: Yes.

MR BEAL: If we could then please go to page 26 and look at paragraph 61 where Lord Justice Lloyd returns to this theme. Again, please can I invite the Tribunal to read that paragraph.

THE PRESIDENT: Yes. (Pause).

Yes.

MR BEAL: That is the circularity problem in a nutshell.

There are further findings then at 65-66 on the next page, starting the next page. Perhaps we could pick it up at 64, where his Lordship dealt with the modified *Greenfield* approach please could the Tribunal read that paragraph and then paragraph 66. (Pause).

THE PRESIDENT: Yes.

MR BEAL: So the core reasoning is as follows: there is an end-to-end obligation. That imposes an obligation on BT to pay for calls that are terminating on H3G's network. The price that is paid for that is entirely within the gift of H3G. It gives them de facto monopoly power for every call that is terminating on that network.

That is dealt with through a regulatory solution which says: you will agree to pay a competitive price and, in default of an agreement, you will have to go through a dispute resolution process at Ofcom. The CAT has said it is appropriate for the issue to be dealt with contemplating the end-to-end obligation, because that is a necessary part of the contractual framework, but you cannot assume in your favour that that regulatory control on pricing exists.

We say that same reasoning applies to the concept of the MIF: you have got the MIF, you have got the mechanism for a payment system taking place, but the price that is payable between different elements in that

particular payment scheme is otherwise to be negotiated freely and at large. The fact that a regulatory provision comes along and caps the price that can be paid for that cannot sensibly be taken into account for determining whether or not there has been a restriction of competition through the exercise of market power, because otherwise you are assuming in your favour that that measure that is brought in to deal with market power and the exercise of market power is there in the actual situation, whereas in fact it is only being imposed precisely because you have market power. If you take it into account you lead to a -- the circularity is similar to the Cellophane fallacy: you are not taking into account the fact that the exercise of market power has already produced the factual situation you are in.

MR TIDSWELL: So this is a different argument, is it not, quite distinct from the argument that you run about characteristics of the counterfactual being unlawful because they are still collusive?

MR BEAL: Yes.

MR TIDSWELL: I am trying to work out how this fits in. I mean obviously in these cases, or this case -- one can imagine a situation where you are actually trying to determine whether or not there was the market power and market power is the answer, but here the market power is

not the answer to the infringement because the collusion is the starting point.

MR BEAL: Yes.

MR TIDSWELL: But I think, I am right, are you saying that -- so you are saying there is still a restriction, because effectively you end up with a MIF, effectively, is the point you are making --

MR BEAL: Yes.

MR TIDSWELL: -- but how does that fit into the analysis though? Is that saying that in the counterfactual --

MR BEAL: You have to strip out from the counterfactual the regulatory control that has only been imposed because there is already an existing issue with the exercise of market power. Because otherwise if one imagines the -- the IFR -- the risk with including the IFR is that you simply assume that pricing up to the level of the cap is perfectly acceptable which of course is the wrong conclusion to reach, because the cap has been put in place to constrain the exercise of market power, but it does not tell you how that constraint should operate.

MR TIDSWELL: I certainly understand the argument, but I am just wondering about whether the logical chain works because we are not really in the exercise of the counterfactual assessing market power. That is the backdrop to it, is it not? But --

MR BEAL: Here the analysis -- if we forward on please to page 34, paragraph 92, you will see how Lord Justice Etherton deals with it at 92 and 94. The issue is: is it right that H3G has significant market power?

MR TIDSWELL: But that is not the question we are really asking ourselves here?

MR BEAL: What we are asking ourselves here is: has there been an exercise of market power that has led to a restriction of competition in the acquiring services market? The answer to that is: that is what we are looking at.

MR TIDSWELL: Well, we may well be doing that but in order for that to have any potency there has to be a collusive agreement.

MR BEAL: Yes.

MR TIDSWELL: If we are putting aside the collusive agreement point, because I know you have points on that, but we are just assuming absent that, I think, as I understand it, what you are trying to -- what you are doing is you are inserting into the counterfactual, if you like a prohibition, on anything that might be said to be distortive of competition as a result of a regulatory imposition; is that --

MR BEAL: I think, if I may say so, I am doing it the other

way round, which is I am trying to remove something from the counterfactual it is only in the factual precisely because it is trying to respond to the impacts of a restriction of competition.

MR TIDSWELL: Sorry, if one comes at it from different directions, which is -- the way it is put by the defendants, as I understand it, is that we go right back to the *Mastercard I* and to the discussions that -- what is the final counterfactual. Of course this counterfactual was ruled out because of the hold-up problem on the account of this being -- this being the issue was just setting the interchange fee themselves --

MR BEAL: Yes.

MR TIDSWELL: So what they are now saying is that has come back on to the table as a matter of fact, without putting aside policy considerations, it is just a matter of fact, because the hold-up problem has gone away. That is their argument and that is the logic they step through.

You are saying that you cannot -- you cannot rely on that, that factual situation, because the interchange fee itself -- sorry, the IFR itself (overspeaking) --

MR BEAL: Was a partial response to the very competitive problem --

MR TIDSWELL: (Overspeaking) leaves in place a residual

market power, which is the very thing you are trying to fix; is that right?

MR BEAL: It is more a question of the schemes as I understand it say: look, the problem with all of the counterfactuals, other than default settlement at par up until December 2015, was that they would lead to the failure of the system through excessive pricing on the issuer side causing the hold-up problem. Assume now that the hold-up problem is solved by the IFR, we can then have a world in which the excessive incentives to price too high on the issuing side will not kill the system.

MR TIDSWELL: I do not think they are saying the competition problem is solved, they are saying the hold-up problem is solved, which is a different thing, is it not? I think that is where the argument departs. I think you are saying because the competition problem has not been solved it is not a proper thing to allow them to do that effectively.

MR BEAL: Yes.

MR TIDSWELL: I am not completely sure where that particular principle comes from. I suppose that is what I am really pushing on. I understand how it is put here and why. I understand the logic of it, but of course that is in a different context where the whole point of that

exercise was to work out whether there was market power I do not think that is the point of the exercise here.

MR BEAL: The IFR was not put in place to cure the hold-up problem. The IFR was put in place in order to redress what was perceived to be a failing in the competitive market.

If you assume in the counterfactual that the failing in the competitive market has been solved to that extent then you are in a sense falling into the same circularity issue as existed in *Hutchison 3G* because you are assuming that something that is as a result of the very underlying problem that you are trying to grapple with has been partially solved and therefore can dictate the answer.

MR TIDSWELL: Yes, I think, so I think that.

MR BEAL: It is simply that this is -- the IFR is not simply geared towards ensuring that the schemes can survive because there is no hold-up problem any more. It is geared towards capping the extent of the market power that can be exercised so as to operate as a restraint on what would otherwise be a -- so before and after you have got an anti-competitive situation, that must be the premise. Assume that the MIFs are per se unlawful because they represent a coordinated approach to pricing for all the reasons we have been through.

In the counterfactual, you have to remove anything that is connected with that restriction on competition. *Hutchison 3G*, we say, is authority for the proposition that if a regulatory response is aimed at the competition issue that you are dealing with, you have to remove it from the analysis because otherwise you run the risk of including into the analysis as to what the nature and extent the competitive problem is the very regulatory response that it is designed to deal with it.

MR TIDSWELL: I think the difference, as I understand it, between you and the defendants on this is that your position is that the counterfactual needs -- should not be permitted not to resolve the competitive problem, if I can put it that way --

MR BEAL: Yes.

MR TIDSWELL: -- where as I think they just say -- I think they would say as long as it is not unlawful in a collusion case, and if the element of collusion is gone -- obviously that is all for argument -- they say it is not a MIF at all, it is an IF, therefore you do not need to get into that. I think that is the difference. Is that fair?

MR BEAL: Yes, that is a fair summary. I am simply relying on the circularity of including in the counterfactual a measure that is only there because you have the

problem in the first place.

I mean --

THE PRESIDENT: No, no --

MR BEAL: The difficulty, as always, with circularity arguments is that they are circular.

THE PRESIDENT: What you are saying is that any counterfactual that incorporates the IFR is not a proper counterfactual for the purposes of these proceedings --

MR BEAL: Yes.

THE PRESIDENT: -- even though the IFR is in itself not the abuse, it is the cure to the abuse?

MR BEAL: Yes. In the same way that the dispute resolution mechanism was a cure to the abuse and was stripped out from the counterfactual for SMP power in the *Hutchison* case.

THE PRESIDENT: Yes. Well, obviously we will look at that to see whether that does break the circuity problem. But it is not quite a counterfactual question, but it is a question that I had to deal with in a FRAND case where we had a somewhat annoying competition law question at the end of the arguments which both sides were running and neither side ran successfully. But one of the points was that the holder of a standard essential patent was, for that reason alone, dominant because they had a monopoly over something that was ex hypothesi

standard essential. The problem I had was, well, yes, of course that is true, but the holder of the standard essential patent has also promised the licence on fair, reasonable and non-discriminatory terms, and does not that undermine the dominance?

I am feeling a certain resonance between that and this case, and just to explain why I am a little worried about this is because I took the view that the existence of a FRAND obligation eliminated the dominance that would otherwise exist because you were not in the position of an ordinary intellectual property holder in that you could not actually get an injunction against infringement, you had to offer the licence.

That is not quite this case --

MR BEAL: No.

THE PRESIDENT: -- but it does seem to me just odd that you have got a rule that certainly acts as a constraint on the ability to price, which is not in itself competition related, and not in itself unlawful or improper. Why can it not be used as a crutch to frame, during the period of its operation, the counterfactual which some of the counterfactuals advanced by Visa and Mastercard rely upon?

MR BEAL: Well, sir, you have been referring to the *Optis v Apple* case --

THE PRESIDENT: Yes.

MR BEAL: I am not familiar with the detail, but one consequence of finding there is no dominance because of FRAND could logically be that the day after the judgment they are no longer dominant and therefore they remove the FRAND obligation, which would give rise to the circularity that we are talking about.

Similarly with the SMP case we are looking at here, *Hutchison*, the concern I think was if the MNO no longer has SMP then it no longer has to offer a competitive price.

THE PRESIDENT: Yes, I see, yes.

MR BEAL: So the whole thing unravels.

THE PRESIDENT: That is not a problem in the FRAND case --

MR BEAL: No.

THE PRESIDENT: -- because the obligation remains?

MR BEAL: Well, as I understand it, it is part and parcel of getting the patent in the first place that you have those obligations in place.

THE PRESIDENT: You can't (overspeaking) essential --

MR BEAL: Without offering that as the quid pro quo.

THE PRESIDENT: The two are -- so you --

MR BEAL: But in this case the problem is, had Ms Rose's submissions succeeded, the day after the Court of Appeal's judgment *Hutchison* could have said,

there you go, we are not dominant, we do not have an SMP, therefore we do not need to offer BT a commercial rate, therefore we will charge what we like, thank you very much.

THE PRESIDENT: But that does not arise here because -- let us suppose we buy into the use of the IFR as a crutch. The constraint continues whatever we decide.

MR BEAL: If the IFR is treated as being present in the factual -- sorry, in the counterfactual legitimately, i.e. it is an appropriate regulatory constraint taken into account, then of course, yes, it would follow that the Tribunal would look at the operation of the IFR. But the trouble with that is imagine you looked at the IFR and said, this removes entirely the competition problem, full stop. Imagine that for example we were doing a 101(1) and a 101(3) analysis, then the consequence of the response would be that with one bound there was no competition issue in the first place.

I suppose it follows from that that you would still have the IFR in place and therefore --

THE PRESIDENT: Well, indeed.

MR BEAL: Therefore that would be part of the landscape but it would still be necessarily involving --

THE PRESIDENT: In both the factual and the counterfactual that would be the point.

MR BEAL: Well, simply because it is a piece of legislation does not mean that it will go away.

THE PRESIDENT: No.

MR BEAL: But at the same time the reason for that legislation being there in the first place is simply to solve a problem that you would then say has been solved.

THE PRESIDENT: Yes.

MR BEAL: So where it might kick in would be -- imagine this Tribunal found there is no competition problem and we know that, in the factual, the IFR has been revoked but it is on suspension pending a sensible system being put in place to replace it, imagine that the legislature looked at your decision and said, there is no competition problem here, we are simply going to remove the IFR now, then we would be in a comparable position.

THE PRESIDENT: That is true. I see that. But I mean I am wondering whether it is actually a case of circuity at all. I mean if one reframes the problem as an ability to price without competitive constraint but subject to regulatory constraint, then on that basis the IFR, although it acts as a constraint, is not in fact relevant in competition law terms because the point about the counterfactual is that you can price without bargaining power up to the limit. It does not matter whether limit is there or not, it might solve a hold-up

problem but it does not actually solve the problem that you are not getting an outcome that is a competitive one. You are getting an outcome that is a non-competitive one, albeit one not as bad as it might be.

MR BEAL: Yes, and that is certainly -- you have, if I may say so, neatly encapsulated our substantive point on the counterfactuals, which is essentially all they do is replace one means of co-ordinated pricing with another and therefore they do not solve the problem.

THE PRESIDENT: Yes.

MR BEAL: This issue is being raised in limine before that, simply on the basis that there is a circularity in relying on a regulatory solution/partial solution to a problem in framing the counterfactual, but --

THE PRESIDENT: No, I understand.

MR BEAL: I think I have taken this as far as I can and I can see the force of it remaining in place because it is a piece of legislation and therefore it is not open to somebody, post your decision, to say, I am now free from the IFR, and that may be a ground of distinction between with the *H3G* case. But the overall concept of trying to remove, as a matter of circular logic, something that is a partial cure remains a good argument. It may or may not be an appropriate argument

for the facts of this particular case but I think logically I do still press it.

THE PRESIDENT: No, I understand, thank you.

MR BEAL: Can I then finally just deal, just for the sake of good order, with the end of paragraph 97 at page 36. Essentially the Court of Appeal found that the Tribunal was entitled to proceed and decide the appeal a modified *Greenfield* approach. What that meant in practical terms was: assume end-to-end obligation, do not take into account the availability of the pricing mechanism, leading to a competitive pricing level rather than an uncompetitive pricing level. So Ward LJ was in the happy position of agreeing with both judgments that is at paragraph 114.

Can I then come on to the UIFM counterfactual.

So there is some core points about this which I have set out at paragraph 61 of our note. Firstly, it would be based on a scheme rule. Secondly, it envisages a default zero MIF, i.e. settlement at par unless an issuer notifies a higher rate. Issuers are then free to establish their own MIFs up to the extent of any cap. That cap would be set by the IFR for consumer cards at least until its revocation. The confident assumption is that all issuers would set a rate up to the cap and the scheme would necessarily set a price floor for the MSC

at the level of the cap.

So we say that the objective of that scheme, that counterfactual model, is to maintain the existing flow of revenue streams from merchants to issuing banks, but in a way that is calculated to avoid the competition law criticisms. So it is essentially -- that is the way of putting the old wine in new bottles argument.

That objective is, however, something that I understand all of the witnesses accepted when it was put to them and I think some of them have said as much in their witness evidence candidly. So the object is to maintain positive MIF rates in place to produce a default transfer price that goes from merchants via acquirers to the issuing bank. The only thing that is change is who sets the specific MIF rate. You, sir, the learned president, I think, at one point said to either Mr Holt or Dr Niels, well, the default rate is a unilateral rate set by the scheme and then plugged into the scheme arrangements. Our submission following on from that observation is that the UIFM simply says whether it is going to be set by the issuer, the scheme then adopts it, the scheme then plugs it into the scheme, and to all intents and purposes it is working exactly the same way.

To adopt the language that we saw that the

European Commission engaged -- sorry, used when dealing with the hybrid new business model that Mastercard was considering, its formulas would be used to replicate the MIF.

It follows from this that looking at the *International Skating Union* case as we have at paragraphs 104 and 107, this simply amounts to a co-ordinated setting of the price that is ultimately to be paid. We still have a price that is set by the scheme. That price is still plugged into the MSC as a core component. Therefore the non-negotiable element as, sir, you were just putting to me, remains exactly in place before and after in this counterfactual analysis.

We say that the core elements of the Supreme Court's test from paragraph 93 would remain, precisely because nowhere in that sixfold analysis of essential facts is it relevant to see who specifically has set the rate. Indeed, that is the logic that necessarily drives the Court of Appeal's conclusion in *Dune*, where they said it does not matter whether it is Visa Inc or anyone else, it is an association of undertakings, somebody in that amorphous mass of different legal entities is going to be fixing the rate, that rate is fixed for the scheme as a whole and it then plugs into the MSC in the way I have indicated.

If that is right then simply changing who plugs that rate in from being either the scheme or a Visa entity making it an issuer is irrelevant because it is necessarily part and parcel of the Supreme Court's analysis that it is the issuers in conjunction with the scheme operators, and indeed in conjunction with the acquirers, who are collectively determining the price of the MSC by virtue of setting a MIF that comes out of the computational exercise.

That, we say, is the complete answer but there are also practicality and feasibility issues. First and foremost amongst these we raise what happens when the revocation of the IFR is finally released. Well, the answer must be that this counterfactual would have to assume in its favour that the PSR, who now has decision-making responsibility for dealing with MIF rates, would put in place exactly the same cap and that, we say, cannot be assumed. You end up with a position where you have default settlement at par for commercial cards and for inter-regional transactions but nonetheless the UIF for domestic and intra-EEA MIFs until Brexit. After Brexit that then gets stripped back because post Brexit intra-EEA no longer exists, you have got inter-regional, so they go back to being set as a default MIF by the scheme, except for Ireland where

you have to continue with the UIFM for Ireland but not for England in relation to intra-EEA MIFs.

It is a recipe for confusion and there has been no sensible suggestion as to how this would be put into place in a form of scheme rules. I think we have not seen any draft scheme rules for this UIFM model.

What we do have of course is the New Zealand experience, but the New Zealand experience shows entirely how regulatory concerns arose not least because of the consequences for the retail payments industry where you had differential pricing between large merchants and small merchants. Some large merchants were able to exercise countervailing bargaining power and get rebates, small merchants were not. The evidence that we looked at from New Zealand was smaller merchants on average were paying two and a half times more for their MIFs than larger merchants. We saw the response from the Ministry of Business in New Zealand that this was not satisfactory in terms of allocative efficiency, the good of the retail market, and so on, and it prompted the 2022 Act which set MIFs for debit cards in card present transactions at 0%.

So that is an inauspicious historical example of a unilateral interchange fee model, so-called, operating and of course the HACR, as I understand it, the Honour

All Cards Rule, in New Zealand was not fully relaxed, it remained in place, and merchants still had to accept cards within certain categories that were issued by New Zealand issuers.

So it necessarily depended for its efficacy in achieving levels at or around the cap. For certainly the smaller merchants it depended for its efficacy upon the HACR which is part of the scheme rules that is challenged as being anti-competitive in this case. It follows that if, in the counterfactual, we are stripping out the ones the rules that have anti-competitive effect, we need to strip out the HACR at the same time.

I have referred to something in green there. It is probably the worst joke I have ever committed to paper so it is just as well it is staying in green and will not be put in the public domain, I hope, but there we are, that is all I will say on that. I do not think I need to go into closed (a) to air that joke or (b) to go through the evidence. I am happy and I am content to rely upon the very detailed written submissions we have made on that particular issue rather than now.

So where we end up, we say, on this UIFM model is simply it is an intellectual exercise that is intended to devise a pricing strategy that obscures the competition concerns but does not actually engage with

the six core elements of the Supreme Court's reasoning in paragraph 93. For those reasons, it is neither an appropriate nor a viable nor a realistic counterfactual.

Unless you have any further questions for me on that, those are my submissions on UIFM.

I am going to move on to the pure bilaterals counterfactual. The first point to make here is technically the fifth point in the Supreme Court's reasoning, which I had already set out, but for your note it was back at the bottom of page 6, the sixth element -- sorry, the fifth element, (v), in the counterfactual there would ultimately be no bilaterally agreed interchange fees.

As I went through, I think with Dr Niels, when you look at the genesis of that comment, it reflects the fact that there would be this transitional period where, once you proceed on the basis that there is zero MIFs, would there be chaos in the market? Answer: no, there would be some bilateral negotiation to get through the situation until order could come out of chaos and that would lead to, over time, the existing arrangements for MIFs to be paid, to be negotiated away. It was -- in that sense it was a transient bilateral period whereby the consequences would be dealt with.

It does not mean that if one envisages any form of

bilateral agreement, no matter how unrealistic, that that is sufficient to mean that it is separate from what the Supreme Court had in mind. So what the Supreme Court was saying was not that if you come up with a system of bilaterals that works, then that is fine and our reasoning does not apply, it was simply saying that, as a matter of fact, bilateral agreements would not lead to an MSC that was higher over time than zero because in fact any transient interstitial arrangements between the parties would be -- would compete the MIF away over time.

We then need to look at what is the prospect of genuine bilateral negotiations leading to a MIF that is set at the IFR cap. On that, our submissions are that this is neither a lawful nor a realistic counterfactual.

Firstly, as I have indicated at the top of page 22, Mr Willaert acknowledged at paragraph 25.11 of his witness statement, that is {RC-F3/1/10}. We see at 25.1 he deals with a suggestion that I think had been made by Ms de Crozals in her witness statement that you can have either ex-post bilateral negotiations or ex-ante, I seem to have lost -- 25.11, that is at the bottom of page 10.

He is then noting that:

"I would note that in such a system interchange fees could be determined either before or after the

transaction occurs. Only the former would, to my mind, be a traditional bilateral agreement."

The point he essentially then makes is if it is all determined ex-post, there is no constraint on the issuer simply saying, well, this is the amount of money I hold, this is the amount of money you are going to get, if you do not agree with me, tough, that is simply what you are going to get.

So Mr Willaert fairly, in my respectful submission, recognises that that defaults into what is essentially a unilateral model of the issuer setting whatever the price will be. Of course, it is also a model that would create massive difficulties for any acquirer and indeed any merchant. Who is going to sign up to agree to take a payment card when you do not know how much money you are going to get? That causes real mayhem.

I think it is fair to say Mr Willaert certainly did not, as I understood it, think that was necessarily a terribly good idea and therefore they were nailing their colours to the mast of ex ante bilateral negotiations, so that is what I am going to concentrate on.

I should also add, see paragraph 71, that the Commission itself has concluded that ex-post pricing would lead to conflicts which would inevitably imperil

the functioning of the system. Essentially, merchants would be held over a barrel and there is no way anyone would agree to that sensibly in advance.

Therefore I am going to focus on the bilateral rate agreed in advance. Why would a merchant acquirer agree a bilateral rate in advance? The difficulty from the acquirer's perspective is you do not necessarily know what anyone else in the market is going to get. How are you going to persuade merchants to sign up to whatever you are prepared to agree to in advance? That seems quite problematic. You do not know, for example, whether or not somebody else has been able to do a better deal than you, and you would be able to then undercut whatever deal you had agreed with your issuers in circumstances where things were generally at large.

It is only really, we suggest, in the presence of the Honour All Cards Rule, in circumstances where a merchant has no choice but to take every payment from every card once it accepts one payment from one card from one issuer, that you have a position of market power where the issuer can essentially insist on getting whatever it demands. So it is the fact of the HACR and the requirement for merchants to have their transactions settled that would give rise to the competitive force that would require the merchant to accept, and the

acquirer therefore to accept, whatever the issuer said it was going to demand, with the constraint of the cap to avoid the hold-up problem.

That effectively amounts to a system that is put in place of sham negotiation. It is not genuine negotiation. It is not freely agreeing a price. It is saying: if you do not agree a price for everyone on the issuer side, then you do not get access to the system, full stop. It is effectively what Mr Dryden rightly called unionised pricing on the issuer side: one out, all out, you have to agree with all of us or you do not agree with any of us, you have to take what we say is being demanded.

That also holds merchants over a barrel because they are in a position where if they do not agree an agreement with everyone through their acquirer they nonetheless have an obligation to accept the cards and they have to take whatever price they are given.

Dr Frankel called that mandatory bilaterals and he is right. In order to get access to the payment system full stop you have to do the deal that is being demanded. That is all against the background of a clear intent and the purpose of producing the positive income stream that operates as the subsidy in the way I have indicated.

This system too is effectively erecting a coordinated approach to setting the actual price that will be paid by way of a MIF and that will therefore form the substantial component of the MSC. The MSC is no more freely negotiated under this arrangement than it is under the factual.

There are obviously manifest problems with this. How on earth do you go about putting in place a series of genuinely bilateral agreements between the myriad people involved in issuing in the EEA, 3,000 or so issuers, goodness know how many acquirers on the pan-EEA market. Of course, if you are in a position where you have to accept cards and you have to settle through the scheme, then in reality you are being faced with an outcome for a transaction where you have accepted a payment card where the price is handed to you on a plate and there is nothing you can do about it anyway because that is the settlement figure that you will get.

In order to overcome that suggestion, we received very belatedly, I think 14 March, Mastercard's note on settlement. On one reading what that seems to do is to say that both clearing and settlement and the price that is paid for the MIF will be negotiated on a purely bilateral basis.

As I suggested to Dr Niels, that envisages myriad

bilateral negotiations between each acquirer and each issuer in the EEA where everything is taken out of the scheme. There is a certain irony that the consequence of that would be to hypothesise no scheme at all because all you are left with -- I think Dr Niels said, well, you would still have IP rights and licensing ... That is not a payment system. That is the payment for the use of a licence trademark which does not carry much value. It certainly is not a payment system.

Rather ironically, in this counterfactual world that has been conceived of, we would suggest as an afterthought rather than as a thought experiment, a huge amount of time and effort and money has no doubt been devoted to this in order to come up with an answer that they imagine away the very payment scheme that they want to exist.

If I were Mastercard, I would be quite worried about that proposition because they would not have a functioning scheme at all. In any event, any form of workable answer to this must necessarily involve a scheme being involved and clearing and settling transactions at some level, even if you delegate down the physical processing of batching files. Even if you delegate up or down the actual settlement, so that a settlement takes place directly between acquirer and

issuing bank in a given factual range of circumstances, you still have to have the scheme co-ordinating which transactions are being paid through the scheme. If you do not have that, you do not have the scheme, and so the whole thing frankly collapses as a thought experiment.

If you have a sensible scheme which does involve payment and the obligation to be paid that the merchant can take at face value, then you necessarily have to have a more fully functioning scheme that that counterfactual would suggest but that then gives rise to the suggestion that you have a series of bilateral agreements between 3,000 or so issuers and hundreds of acquirers on a pan-EEA basis because that's the very complexity that makes the scheme unworkable.

Professor Waterson, with Dr Niels, elicited the recognition that what was envisaged was considerably more complicated than the Maestro bilateral, which essentially worked with a negotiation being required between parties to the Maestro scheme with the fallback of arbitration and, of course, you have seen the evidence -- I think I dealt with it with Mr Willaert -- that the anticipation in the arbitration scheme was that the default MIF that was set by the regime, by the scheme itself, would apply and therefore that arbitration essentially replicated the default MIF

regime in any event.

So as Mr Knupp recognised in his evidence, that level of bilateral pairing would simply make the system fall apart. It is too complex. The pricing points for acquirers are too great. It requires too many variables to be put into what would otherwise be a complex enough system by itself. I think Dr Niels acknowledged, did he not, that there were operational difficulties associated with this particular counterfactual.

Fourthly, this counterfactual necessarily depends upon the presence of the HACR. Without the HACR the scheme could not guarantee that all issuers would have their cards accepted. If large acquirers are able to exert countervailing bargaining power on smaller issuers then you lead to a position where you would not necessarily have the rates being set at the full level of the IFR.

Imagine a new issuer entering the market, say with a digital product, wants to grow their acceptance network, they would immediately go to Worldpay and Elavon and say: please can you take our card, promote our card with your merchants, we will give you a lower MIF to do so, and a lower Merchant Service Charge therefore to merchants, to promote card acceptance and digital wallet acceptance. The consequence of that

would be that MIFs would not be settled at the IFR rate. There is scope, absent the HACR, for that to happen.

But you need the Honour All Issuers aspect of the HACR not to be present for that type of negotiation to be capable of being dealt with.

Dr Niels' second report, I have given the reference at paragraph 80, says in terms each agreement crucially depends on the existence of the HACR and that was confirmed at paragraph 320, page 25 of his second report. The counterfactual without a HACR was not realistic and we say that is also borne out by Mr Willaert's evidence.

If instead we then consider the situation with no HACR in place, as I have said that cannot guarantee that MIFs at the rate of the IFR would be set. Over time you would anticipate genuine negotiation taking place. A smaller issuer would do a deal with some of the larger acquirers and larger merchants to take a hit on their MIF rate in order to grow acceptance. Over time that card or digital wallet solution would gain traction, would gain a following, would gain acceptance and that would itself put pressure on existing duopolistic card schemes to reduce their rates as well. So that competitive pressure, from a scheme perspective, would drive down MIF prices leading, over time, to reduce

levels of MIF. Mr Willaert, {Day9/67:11}, I do not think we need to turn it up, accepted that:

"Without some form of support from a default rule, there would be uncertainty injected into the negotiation process."

That is all really one needs from a perspective of analysing what would happen in the counterfactual. It is the uncertainty as to pricing that would give rise to meaningful negotiation. It is the lack of certainty, lack of uncertainty as to pricing, i.e. you know what you are going to get and there is no scope for negotiation. That means you do not have a negotiated outcome in the acquiring services market. That is the vice. The vice identified by the Supreme Court is the absence of a negotiated MSC across the entire piece of the MSC. A fully negotiated price is what they land upon in the --

MR TIDSWELL: Could I ask you about Honour All Issuers and Honour All Products. Just so I understand where you are coming from here, I think you are saying you are concentrating here on the Honour All Issuers and obviously there is some debate about whether that is as much of a competition problem as Honour All Products, but I don't think that distinction matters for your argument, does it, because am I right in saying you have

got to impose at least that part of the rule --

MR BEAL: Yes.

MR TIDSWELL: -- and when you do that the scheme is effectively inserting itself into the arrangement, therefore it is no longer separate from the scheme --

MR BEAL: I come on to deal with the detail of the difference between HAIR and HAPR in that relevant section of the rules. But in a nutshell, the benefit of HAIR, Honour All Issuers, is if you are a new issuer you have a ready-made acceptance network. That removes a parameter of competition. What is the parameter of competition? Well, the degree to which your product is being accepted in the market. So you are already getting maximum acceptance rates from every merchant that is prepared to accept a given product within that scheme if you have that rule. So taking somebody who innovates around the Visa proposition or Mastercard proposition by putting a product on the rails of an underlying card, they know that they can go into the market with that card underneath their product and everywhere that accepts Visa and Mastercard will have to accept that because they have to accept that new issuer of that product. That gives them a significant competitive entry.

MR TIDSWELL: For the purposes of this argument I think --

or maybe it is at two levels, but I think maybe I have seen you say somewhere that because the Honour All Cards Rule is anti-competitive, therefore it forms an unlawful element in either counterfactual if it is present. So putting that aside for the minute, I think you are also saying that regardless of whether it is anti-competitive, so the Honour All Issuers aspect has the consequence here that it connects the scheme to the bilaterals model and if you take it away, you end up with a counterfactual with more competition in it so therefore there is a restriction, is that right, have I got that right.

MR BEAL: If I assume against myself that the Honour All Issuers Rule is rather not anti-competitive --

MR TIDSWELL: Yes.

MR BEAL: -- which is in fact not the way round Mr Dryden puts it, he says the Honour All Issuers Rule is more clearly a tying obligation than the Honour All Products Rule because it is forcing you to do business with a new entity rather than simply having to accept the full range of the products.

MR TIDSWELL: I am only putting it to you that because I think there was some discussion on some of the regulatory documents that the Honour All Issuers Rule was more justifiable but I am not expressing a view --

MR BEAL: No, the IFR targets specifically the Honour All Products Rule, thus implicitly leaving aspects of the Honour All Issuers Rule intact in the sense of not being prohibited and clearly there is an element of, once you have got a scheme in place, you would want your products to be accepted by people on a non-discriminatory basis. Flipping things round, why should -- assuming all things being equal, it is the same price being charged by the scheme for the use of a given product, why should a merchant be able to discriminate between Lloyds Bank and HSBC? The answer is there is not really a reason for that.

I don't think that the IFR regulation is thinking about it from the perspective of the countervailing -- the impact it has on the countervailing bargaining power of the merchants with a new issuer to say: if you are going to enter this market I want to be able to do a bespoke deal with you and get a different price. Because that is much more plainly and obviously anti-competitive because you are forcing me and my pricing reaction not to be able to exert any countervailing bargaining power with that issuer even though they might be willing to pay for the benefit of a new deal by giving me a better rate so that I grow their acceptance network.

So it is clearly having an impact on that parameter of the competition but you are right, sir, to point out to me that the IFR seems to calibrate the two differently.

MR TIDSWELL: Yes, and I think you have correctly recalled my question as being on the assumption it is not anti-competitive.

MR BEAL: Yes.

MR TIDSWELL: Have I described correctly the way that it plays in the (overspeaking) --

MR BEAL: If the Honour All Issuers Rule is not per se anti-competitive, so it is nonetheless plugged into the counterfactual, the consequence will still be that the effect of that rule, for better or worse, is to drive a consequence where the merchants have no choice but to accept a non-negotiated price. So in that sense it does not matter whether you call it lawful or unlawful at all. It still drives the end result that you end up with a determined price given by the scheme that is incapable of being negotiated away by the merchant at the MSC level.

MR TIDSWELL: Yes.

MR BEAL: I hope that answers your question.

MR TIDSWELL: It does. I think that is helpful, thank you.

MR BEAL: I am obviously trying to cover both aspects and

ride both horses, but I do not think those horses are going in a different direction.

MR TIDSWELL: That is clear, no.

MR BEAL: Is that a convenient moment? I am being given a few notes and it will allow me to process them over the transcriber break.

THE PRESIDENT: We will rise for 10 minutes.

(3.21 pm)

(A short break)

(3.3 2 pm)

THE PRESIDENT: Mr Beal.

MR BEAL: Can I please deal with the Maestro issue --

THE PRESIDENT: Yes.

MR BEAL: -- because I said I would come back so I am.

Our claim -- the Maestro claim, as I understand it, relates only to Marks & Spencer. It is not actually an umbrella proceedings issue.

The fault lines, as I understand it, are these: we have claims for multilateral interchange fees in relation to Maestro cards. Mastercard's response is Maestro rates were set bilaterally, therefore it is not a MIF. It is true we have not claimed for bilateral interchange fees so that falls outside the scope of the claim.

The way it has been dealt with in correspondence, as

I understand it, is we have said we are only claiming for MIFs. If the MIFs are found to be unlawful then the same reasoning can be applied at Trial 3 stages for the Maestro aspect of the claim by Marks & Spencer. If it turns out at Trial 3 that it is a BIF not a MIF, then of course we have not claimed for that and therefore that determines the issue. But either way, the essential reasoning that is an umbrella issue can be plugged into the Maestro question at that stage and it can therefore be dealt with in Trial 3 and, because it is not an umbrella issue in any event, that is the appropriate place to deal with it.

That I hope means it goes into the box, not for now, and therefore in my internal box not a problem. I hope that satisfies Mr Cook. If it does not, no doubt he will tell you.

THE PRESIDENT: Very good.

PROFESSOR WATERSON: Can I just check --

MR BEAL: Of course, sir.

PROFESSOR WATERSON: The IFR, of course, came in after the beginning of the claim period, so I am not sure -- it may be you want to say what you think would have happened before the IFR came in, but still within the claim period, as relating to these schemes.

MR BEAL: So the answer is without the IFR setting a cap

independently of the scheme, those counterfactuals would not work and indeed that is the premise behind why default settlement at par becomes the only counterfactual available, because of this upwards-only pressure on the issuing side to drive interchange fees to increasingly unrealistic levels so that they start jeopardising merchant acceptance rates and ultimately the scheme collapses under the weight of its own pressure.

For the period prior to December 2015 our claims for domestic and intra-EEA MIFs have been adjudicated upon in the *Dune* decision and summary judgment was entered for the Humphries Kerstetter claimants and my understanding is that that reasoning is accepted to apply to our pre-2015 MIFs as well.

But in answer to the specific question, sir, that you have raised with me, the answer would be in the absence of the IFR, the same scenario would apply as it did in *Sainsbury's*, which is that schemes would accept that they would rather have their schemes than a scheme that collapses and therefore default settlement at par would be the correct counterfactual.

PROFESSOR WATERSON: Thank you.

MR BEAL: That is how you get there but the reasoning is a little more convoluted than simply saying, we have

summary judgment in our favour ...

Coming back then to this question of bilateral negotiation and what does it mean if the HACR is not in place. Well we can see from {RC-J3/73/76} what the European Commission thought would happen if in the absence of the MIF there were genuine bilateral negotiations giving rise to uncertainty. We see on that page, page 76:

"The impact of interchange fees [at Recital (250)] is also highlighted by the views of some acquirers as concerns the potential competitive advantage that an acquirer would obtain with either high share of 'on-us' transactions, on which, by definition, it does not pay any interchange fee, or by concluding bilateral agreements with issuers ... Several acquirers indicate that having a high proportion of on-us transactions enables them to offer lower MSCs since no interchange fee is paid .... and another one stated that an acquirer with a high share of 'on-us' has a competitive advantage because it can set internally the share of the MSCs designed'."

Then over the page another example is given and then at the end of last three lines of Recital (251):

"It should be emphasised that the fact that the acquirers with a large proportion of 'on-us'

transactions can set the MSC below the scheme's MIF does not contradict the floor effect because there is no MIF on 'on-us' transactions".

Then at Recital (252):

"A majority of acquirers express their views on the impact of bilateral agreements on interchange fees on the competitiveness in the acquiring market describe this impact as positive since bilateral agreements would permit lower MSCs, thus highlighting once again the close link between interchange fees and MSCs."

We see there, the last three lines:

"An acquirer active in the country where bilateral agreements are widespread summarised the impact of bilateral agreements stating that the bilateral agreements had put pressure on MSCs."

So in other words where you have genuine bilateral negotiations that does exercise a competitive constraint on MIFs and MIFs are lower as a result. So it necessarily follows that either you have this genuine outcome where MSCs are driven down over time, which of course is not what the schemes want to establish, or you have not got a genuine system of proper bilateral negotiation and therefore you fall foul, we say, of the fact that you are simply replacing one version of a scheme with a coordinated pricing approach with no

negotiation with another version of a scheme that has a coordinated pricing approach with no negotiation at the MSC stage.

We also see at page 92 {RC-J3/73/92}, Recital (304), that bilateral negotiations following the removal of the MIF were considered by the Commission and what the Commission there said was:

"In the absence of inter-regional MIFs there would be no transparency between acquirers as to what MIFs their competitors pay, i.e. as the inter-regional MIF costs of the other acquirers. In such a situation acquirers have an incentive to negotiate as low an interchange fee as possible since the level of the interchange fee has an impact on the MSCs: the lower the interchange fee the more scope for the acquirers to decrease the MSC to meet competition ..."

So once you start stripping out elements here of the inter-regional MIF, you end up with genuine uncertainty and that genuine uncertainty drives down the MSC prices.

We see in the next Recital, (305) {RC-J3/73/93}, six or seven lines down:

"In the cases where bilateral interchange fees were negotiated, which all focus on domestic transactions, one may note that the level of interchange fee agreed is always lower than the one of the applicable MIF."

So that confirms that if you do have this genuine scenario, the natural consequence is a lower MSC. If you have a lower MSC in the counterfactual with genuine negotiation then you have an appreciable restriction on competition in the market and so we get through to the 101(3) stage come what may.

In the absence of the HACR then an issuer would be exposed to the risk of widespread non-acceptance of their cards for all the reasons we have been through in discussion with the Tribunal, and we see at paragraph 86, page 25 of my note, Mastercard actually recognised in a submission it made to the European Commission that the HACR is necessary to underpin the system, it said, because without it the payment scheme could not exist. That was the expression it used.

We do have an issue as to that with objective necessity, but it goes to show how important Mastercard considers the Honour All Cards Rule to be for maintaining the ability to drive high interchange fees, which are then used to subsidise the issuing banks in the way that I have described.

Finally, of course, this counterfactual, as with the UIFM, requires one to build into the thought experiment a series of contingency planning measures: what happens

if the IFR is repealed -- rather the repeal comes into effect, what happens if the PSR does not replace it with the same or a different cap, what happens post-Brexit, what happens with Ireland, inter-regionals -- intra-regionals, sorry, as opposed to UK inter-regionals, how do you deal with the commercial card aspects and the inter-regional cards within a scheme where you have a default setting for some and this bilateral negotiations, in theory, for others?

Is the negotiation restricted simply to aspects of the MIF? Why would an acquirer negotiate only domestic and then take it on the chin for everything else? It is a very odd situation. The reason it is a very odd situation is because it is entirely artificial. It has been derived by, no doubt, predominantly the legal team at Mastercard in order to try and justify the MIFs that they are very keen to retain for purely commercial reasons.

The answer to issue 3.1 is accordingly that the appropriate response is that there is no reason to deviate from the Supreme Court's findings. Even if I am wrong on that, then the default settlement at par counterfactual is both viable and realistic and neither of the other alternatives is either viable or realistic, properly considered, nor indeed would it be lawful

because it simply produces the same result. For that reason we commend to the Tribunal, proceeding on the basis of a default settlement at par, the counterfactual. It has got the benefit of having been considered before so, like Blue Peter, here is one that was made earlier.

Issue 3.2, this is the object issue, object restriction. My answer to each of the sub issues relating to object restriction is the same because the mechanism by which the MIF is set is the same for each of them and I do not propose to repeat my submissions on object infringement.

Issue 3.3, top of page 26. If one of the other counterfactuals is the relevant counterfactual, what does that mean for the case on appreciable restriction by effect? We recognise that the likelihood is that either counterfactual in the presence of the Honour All Cards Rule would tend to force the majority of MIF rates to at or near the level of the IFR cap and indeed that was something I think that both Dr Frankel and Mr Dryden have accepted.

There might be some exceptions for large merchants. The Amazon example has been trotted out a lot but obviously HMRC have also had significant countervailing market power and you have seen how they have exercised

that in certain circumstances.

Absent those large merchants with proper significant countervailing bargaining power we recognise that there would be a tendency towards the IFR cap.

In the absence of the HACR we say that outcome is not assured and over time you would end up with the free negotiation consequences that I have just been looking at by reference to the Commission decision. So if you have got genuine negotiation, genuine uncertainty producing genuine ability to negotiate down the MIF rates, then we do say that there would be an appreciable restriction on competition because in the counterfactual world, it would not be established that the MSCs would be at the same rates. That is our answer to issue 3.3.

Can I please then move on to issue 4. The first question essentially says: can you apply the essential factual basis from the Supreme Court to transactions involving inter-regional transactions and/or are there differences such that you have to adopt a different approach? We say there are no material differences. The mechanics of the MIF are the same. It is still set by default. The difference here, of course, is that it is accepted that the counterfactual is default settlement at par, not anything else, and so you can simply read across, from the Supreme Court's essential

core findings, that element as well.

What the scheme's case actually is is nothing to do with the six Roman numeral points in the Supreme Court's decision at paragraph 93. Their case is: imagine all of that is true and imagine that the MIFs are stripped away from the analysis and produce the prima facie restriction of competition in the counterfactual because they do not exist and therefore MSCs are lower, assume all of that against us, then let us look at the consequences. Not in the acquiring market, but in the inter-scheme or the issuing market. So change the focus, change the counterfactual market, change the product -- even the product groups on Dr Niels' analysis -- change all of that for the counterfactual and let us look at what would happen.

They say in that, if you go down that route of analysing things in that way, then there would be customer switching, cardholder switching, issuing bank switching to competing product which would then lead ultimately, they say, to MSCs at or about the same level as they are now or indeed higher.

Our core objection to that is it is not an appropriate use of the counterfactual process.

You are meant to keep the market in the counterfactual the same as the factual. You cannot chop

and choose and then say, ah well, the consequences would be X therefore the result is different. It is sufficient for our purposes that, in the factual, Visa and Mastercard transactions make up a very significant proportion of the market, 98%/99%. That makes any removal of the MIFs in that market appreciable in the sense of once the MIFs are out, MSCs are lower, sufficient transactions with Visa and Mastercard in that situation, that there is an appreciable effect.

Really the defendants cannot then say it follows from that that the consequences would be that over time people would switch and you would end with higher Amex charges, for example, on inter-regional transactions or that issuing banks would remove functionality for inter-regional transactions. Because none of that goes to actually compare the factual with the counterfactual on a proper basis. It is looking at consequential effects in other markets.

Inter-regional transactions, of course, are not a standalone product, they are a feature of an existing either commercial card or consumer card that has been issued in a foreign country outside the EEA, historically, now outside the UK post-Brexit. They are a functionality that is bolted on to an existing consumer or commercial card and therefore that is even

less reason to treat the relevant product as distinct from that which was considered in the Court of Appeal in *Mastercard v Sainsbury's*.

What we do not see from any of the factual witnesses, or the defendants' experts, is any sensible basis for distinguishing the impact of the inter-regionals on the MSCs payable in the acquiring services market. Instead whether they look at is consequences on what an issuing bank in theory in South Africa might be willing to offer to a South African customer. They have posited all sorts of scenarios in which the functionality would be scaled back to deal with the loss either of MIF revenue from the UK and Ireland specifically or the MIF revenue from the EEA as a whole, for example. All of that, with respect, becomes entirely fanciful because the idea that a South African bank would somehow restrict its functionality of its cards for its own customers when 98% of its domestic transactions are domestic rather than inter-regional, let alone what proportion of that inter-regional transaction is attributable to the UK and Ireland, just with respect makes no sense.

The core premise for our case here is that the inter-regional MIF is a MIF that is charged on transactions that are conducted by merchants in the UK

and Ireland. It is a MIF that is set by the scheme. The MIF set by the scheme then forms a core component of the MSC payable for that particular transaction and that element of the MSC is not capable of being negotiated freely between the acquirer and the merchant so it is exactly the same competition problem, it is exactly the same restriction. The fact that it happens to take place on an international transaction does not change that analysis. That is the answer to our -- the question on issue 4.1.

Issue 4.2 is the object question. Same answer.

Issue 4.3 is: does it have an appreciable effect? Because we say you do not get here because there is no proper basis for distinguishing the Supreme Court, the answer is that the premise does not hold good because the answer to 4.1 is no, not yes. But even if we do look at the effects of restriction in competition in the acquiring market in the UK and Ireland, assuming in my favour that the setting of the MIF remains a restriction of competition, for the reasons I have now been through countless times, then in the counterfactual the MIF is removed. In the counterfactual therefore for Visa and Mastercard transactions a lower MSC is payable and, for all the reasons I went through earlier, as a matter of law, that is where the analysis stops. You do not need

to look at substitute products or different payment methods or a different product market to work out that that represents a restriction of competition in the acquiring market.

Any analysis of countervailing impacts on a different market comes in at the Article 101(3) stage for the legal reasons we went through earlier.

We do say see paragraph 98 of our note, page 28, that on a proper analysis of all that evidence that we had to go through the defendants have not discharged the evidential burden of showing that the MSCs would be higher in the event that inter-regional MIFs were reduced to zero and that holds good for all of the reasons I went through with Dr Niels and the critique of his switching analysis: it is an unreliable survey, it was a small number of survey participants, the survey questions were flawed, Dr Niels put in place a figure for Amex -- for example, for the costs of Amex -- which was unreasonably high and skewed, the level of switching that would be required to have Amex take over the entire inter-regional market would be phenomenally large, it is just not a realistic option. Then in terms of issuer bank switching, it requires a series of wholly unrealistic views as to how an issuing bank would respond to the deprivation of MIF income from a very

small part of the global market.

Even if one assumes that inter-regional MIFs, full stop, the revenue goes for Visa and Mastercard transactions, the suggestion that that would somehow dissuade issuing banks from allowing its customers to have any international functionality on Visa and Mastercard is just deeply flawed. There would be cardholder revolt because everyone wants to be able to use their debit card or their credit card abroad these days, and somebody somewhere would find a way to meet the costs of running that international functionality to the extent that additional costs are incurred in circumstances where we have no real data as to what those additional costs would be.

So the short answer is that the very elaborate and extensive thought experiment that has been invoked by the defendants' experts lacks data, is not properly thought through, is legally irrelevant, and does not produce the outcome that they require.

PROFESSOR WATERSON: Can I just -- I am just trying to understand your position. So take your example, the South African bank, could it say, unfortunately, your product is not for use in the UK, but you can use it everywhere else in the world?

MR BEAL: I went through -- and this is in our detailed

written closing --

PROFESSOR WATERSON: Okay.

MR BEAL: In terms of the detail, getting into the weeds, the Visa rules, as I understand them, would still require that issuing bank to accept a card payment that is from a geographically restricted territory and that is a scheme rule I put to Dr Niels, I think.

PROFESSOR WATERSON: Right.

MR BEAL: That is the situation. Could they simply refuse to allow authorisation for transactions that emanate from a given region? That seems to be the import of the notes that have been produced very belatedly by the schemes, but I am not in a position to have tested that with the witnesses. Let us assume for the sake of argument that it is open to an issuing bank to say, I am never going to accept authorisation codes if we can identify geographically that they came from Ireland. What is the position then? The answer is the issuing bank would have to say to its customers: I am not going to give you functionality to use that card in Ireland or the UK.

Imagine that they did nonetheless then use that card, contrary to the interdiction that had been given. The answer would be that the attempt to use that card in Ireland would come back as a decline

PROFESSOR WATERSON: Yes.

MR BEAL: If it came back as a decline that would no doubt cause huge tension between the cardholder and his and her bank and the cardholder would then be very unhappy.

Imagine the cardholder is very unhappy and actually wants to use -- say it is a South African with family in London and they want to be able to use the card regularly in London, you would imagine there would be some degree of cardholder switching. But the degree of cardholder switching would be small compared to the premise that we are operating on that international transactions make up somewhere between 2% and 5% of any given proportion of overall transactions for a given issued card in a given country.

Then you are essentially saying the entire inter-regional functionality would be shut down for the sake of dealing with a very small proportion of the cardholder base who are disgruntled about not having that functionality in a very small part of the global network which again just, with respect, makes no sense. It would be a minuscule tail wagging a very large dog, so one needs to think about why would the issuing bank try and decline authorisations in that way on the basis it was not getting MIF income. Why would it not simply say, it is annoying we are not getting MIF income, but

we cannot be bothered to decline authorisation for a given market just because there is no MIF income coming from that particular transaction.

PROFESSOR WATERSON: But just so that I understand it, we have not had any evidence either for or against your particular thought experiment there?

MR BEAL: No. No, I mean, it is speculative on every level --

PROFESSOR WATERSON: Yes.

MR BEAL: -- and I recognise that.

PROFESSOR WATERSON: So we are not really in a position to test that either way?

MR BEAL: No, and we do not know what revenue streams were available to an issue bank based in America or South Africa or Australia or anywhere else. We do not know to what extent the proportion of their revenue from MIFs is attributable to the UK and Ireland. We do not know how realistic it is that they would simply be able to decline authorisations for a given geography. We are not aware from the scheme rules that they are permitted to do so.

My reading of the scheme rules is they are not permitted to do this, at least without permission, and you are not meant to be discriminating between the place of a transaction based on where the card is presented

and those are all the scheme rules I have put to the witnesses and which I think have found their way into the closing submissions.

Hypothetically, yes, they could decline authorisation rates if they are able to identify the place of the transaction in advance, but there is a real question as to whether or not they would do so. Here, with the greatest of respect, the evidential burden must be on the card schemes, not on us, to show that this is a plausible and realistic consequence if they get through all of the previous hurdles about it being legally relevant and not the correct question for the right analysis here.

But the absence of evidence is a problem for them, not for me, because I am entitled to say, well, there is no evidence that actually people sensibly would behave in that way.

PROFESSOR WATERSON: Thank you.

MR BEAL: Issue 4.4, is then in relation to the final commitments offered by Mastercard and Visa, 2019, was the decision to terminate the inter-regional MIFs set within the maximum level lawful? The answer to that is no. What the commitments decision does is say: we accept your commitment that you will not charge more than that. It gives no stamp to any suggestion that

setting at that rate or within that rate is lawful, it simply makes no determination of that whatsoever.

National courts, for the reasons I have been through, are free to find an infringement of competition notwithstanding the commitments decision. What cannot happen, see our submissions on *Gasorba* and *Canal +,* what cannot happen is that the commitments decision is ignored to the extent of it being found that there is no infringement of competition whatsoever. You have my submissions on that.

But we do say, in any event, even if that were not right, then it is a necessary corollary of the commitments decision that the Commission must have considered that there was an infringement otherwise they would have given a finding of inapplicability or they simply would not have accepted the commitments in the first place. So the persuasive value of a commitments decision exists, come what may, regardless of the legal analysis under *Gasorba* and *Canal +.*

Issue 4.5. We respectfully suggest that none of the MIFs are objectively necessary and indeed in the conjoint session there was a pertinent, if I may say so, question from the Tribunal:

"Do any of you say that the MIF is technically necessary for the operation of a four-party payment

scheme? Answer: no."

That is as far as I need to go on that point. That applies to each of the MIFs. It is not technically necessary. Given that that is the correct test -- see the Court of Appeal in *Sainsbury's* -- it is unnecessary to go further.

All of the experts actually -- well, the defendants' experts sought to go beyond that by saying, oh, but it may not be technically necessary but it is commercially necessary. That is exactly what the Court of Appeal in *Sainsbury's* said was not the appropriate approach.

Issue 5, commercial MIFs. These answers, it will surprise you to hear, largely follow the answers on issue 4 and indeed in our written closings my learned juniors, and now brother silk, chose wisely to amalgamate these submissions to make less reading. So if you think it is bad, it would have been even worse had we separated out issues 4 and 5, but we did not.

First question: can you apply *Sainsbury's*? Answer: yes. The mechanics are the same, same answer given.

In truth none of the defendants' case turns on any material difference between an inter-regional -- sorry, a commercial MIF and a consumer MIF. They are different card products on the issuing side arguably, not for today, but in any event on the acquiring side, what you

see in the merchant services agreements are a list of products that are all acquired by the same acquirer. They cover premium rate consumer cards, premium rate business cards, standard business cards, standard business debit, standard consumer credit, and so on. You get a table of the different products that are accepted. There is no distinction between them. They are all acquired by the same acquirer, adopting the same IC plus plus pricing approach, you factor in what is the MIF that is charged for that particular product, which is set by the scheme, and then that gets translated into an MSC that is payable by the merchants, depending on the transaction mix, and so on, the transactions in question. You get charged per transaction on an IC plus plus basis.

So what that means is that the *Sainsbury's* analysis does transport entirely across and the counterfactual is default settlement at par. Again, the change comes with this suggestion that you look at the knock-on or consequential impacts on a different market, namely the issuing market, without the commercial -- without the revenue from the commercial MIF, it is said, people would desert in droves because they would not get the rewards points, they would go to Amex. Dr Niels goes so far as to say that issuers would partner up with

different payment methods, unclear how, because Amex does not have a G&S programme any more. But issuers would switch as well.

Mr Holt is slightly more realistic on this. He says, well, you need to look at cardholder switching to Amex because MIF revenue would no longer be available to persuade them to stay with the Mastercard products.

We say that the host of the differences relied upon here for differences between commercial cards and consumer cards are nothing to do with the acquiring services, so the fact, for example, that businesses traditionally may have a higher transaction value, so what? The fact that business reward schemes may involve more cardholders on a corporate basis, so what? The mechanics of the MIF are exactly the same.

Actually I think it was Ms Jones recognised, possibly Ms Suttle -- I am afraid my memory escapes me -- but recognised that a small business debit card at the hairdresser, the example I gave, was remarkably similar to a consumer credit card -- sorry, consumer debit card. It discharges the same function, it is just one is for a self-employed professional and the other is for a consumer.

Coming then to issue 5.2, that is the object question, same answer.

Issue 5.3. This is the effect question. We say that, properly analysed, the effect of removing the MIFs in the default settlement at par counterfactual is that the price of MSCs comes down and that is sufficient to reach a conclusion on restriction. It is only if one adopts the impermissible approach of relying on consequential or knock-on impacts, which we say should be properly done at the 101(3) stage, that that finding could be imperilled.

For the reasons that we have given more fully in our written submissions we again say the defendants have not discharged their burden of showing that MIFs would be higher in the counterfactual with commercial MIFs reduced to zero. The high point of this analysis was really a critical loss analysis, which did not actually look at the likelihood of switching. It simply said: this is the level of market share that Amex would need for the MSC to be the same. So it is even less analysis than one finds in the inter-regional situation and, of course, all of this is still premised on the complete absence of proper data behind any of this reasoning.

What I think Mr Holt had done was to say, well, if Amex achieved a market share that was X, then the MSC would be the same all other things being equal. That was subjected to a critique by us and it is set out in

the written closing as to why that does not hold good. But even taking everything at face value, the level of share that Amex would need to gain in order for that to hold true was just implausibly high in circumstances where it is recognised that commercial cards are a small share of the overall market.

It is recognised that banks will carry on having business accounts with business customers, and a significant chunk of the commercial card market is the ability to offer a business and debit card. That demand is not going to go away and banks will be able to fund, and will have to fund, the provision of a debit card for businesses because so many businesses require that as a means of payment.

So I am afraid we say, simply on the evidential analysis that this Tribunal will conduct, it does not lead to a conclusion that the MSCs would be higher in the counterfactual of default settlement at par.

Issue 5.4 is objective necessity, same answer.

Issue 7, this is where I have come back to the issue that was issue 2.2.3 to deal with Visa Europe Services LLC. I do say this is something of a storm in a teacup because it has been recognised by Visa, I think, that it is a single economic entity for present purposes and does it really matter who we sue if we have sued VESI as

well as the others? Does that really matter? Or VESL as the Visa Europe Services Inc has become.

We have provided detailed answer to this in our written closing but the short answer is that the LLP was previously known as Visa Europe Services Inc. That was a Delaware corporation. It had a permanent establishment in the UK. It was the employer of the vast majority of senior executives within Visa Europe until the One Visa transaction. At that point, Visa Inc assumed responsibility for the overall Visa operation and at that point Visa Europe Limited became the employer of the European personnel, including most of the Visa witnesses.

However, the evidence shows that at the material time, until 2016, it was the Delaware employees who made up the Executive Leadership Team that was responsible for formulating and in some cases directly implementing changes to the MIFs. With Mr Butler there were a series of board resolutions from VESI that indicated that there was a resolution from that entity to set a particular MIF rate for a given period of time, principally I think 2014/2015 up until the *Visa I* transaction in 2016.

Mr Butler was at a loss to explain why on his case it was VESI that was giving those board resolutions. But as I took the witness through each of those board

resolutions was then vouchsafed at the next board meeting which confirmed the accuracy of the minutes. So even taking the evidence at its lowest there are, I think, four of five board resolutions where the MIF rate has been set by that particular entity which indicates that it is indeed not just implementing the scheme but implementing specific changes to specific MIF rates to the extent that it matters.

What that means is on the evidence --

MR KENNELLY: I might be able to help my learned friend there because he is under time pressure. In his note he said it is Visa that insists on maintaining it but because VESI and VEL are part of the same undertaking we accept that we have no defence on this point. That is why we invited them to drop the point because it is no longer an issue between us.

MR BEAL: Well, I think what was being suggested is that we had to drop the claim against this entity because it was irrelevant. My point is there is no point dropping the claim against this entity because it is relevant and if it is accepted that it is part of the overall Visa undertaking, then the short answer to that is there is no point of having this issue before the Tribunal.

MR KENNELLY: We accept it is part of the same Visa undertaking. We had that in our written opening and we

had it in correspondence. It is not an issue between us.

THE PRESIDENT: Thank you.

MR BEAL: Happily I finished that paragraph anyway but it may mean that the Tribunal's reading of the detailed answer that has been provided in the written closing can be circumvented.

If it is not being suggested that we need to remove that defendant as a defendant, then it becomes utterly irrelevant but it means there is no need to remove the defendant.

THE PRESIDENT: Another circuity point.

MR BEAL: I am sorry?

THE PRESIDENT: I merely said another circuity point.

MR BEAL: Yes -- well, yes. Yes, there is a few of those.

Right. That does enable me to come on to the joy that is cross-border acquiring. I have been up hill and down dale on this with so many witnesses I do feel that the Tribunal is fully across the points I have been making and I can take this lightly.

Firstly, how do the rules operate? Well, the Tribunal is fully cognisant of how they operated both before and after the commitments and has the nuance.

Does it have the object of restricting competition

in the relevant market in isolation from other rules? The answer to that is yes. That was the conclusion that was reached in the *Visa II* commitments decision and in the *Mastercard II* CAR decision. We say it applies with equal force before those periods of time and the Commission had made similar findings in respect of Visa's pre 2015 CBAR, in its 2009 statement of objections and 2012 statement of supplemental objections.

It also applies, we say, to the period after 8 December 2015 because we are still in a position where the effect of the rule is to preclude an acquirer, established for the sake of argument in Dublin, from accessing the 0.1% debit card rate that is the maximum allowed in Irish law, and offering that for transactions that it acquires in Dublin even if those transactions occur in the UK and that is as much a compartmentalisation of the national market as the pre-existing rule was.

That in a nutshell is the argument. It is not a terribly complicated argument. It is supported, we say, by the case law that I have taken you to and it -- from a European lawyer's perspective it is not a surprising outcome and indeed the suggestion that somehow cross-border service providers should not be

able to access the home advantage that their home environment may produce is a strange one. Of course you will recall that when I was cross-examining Mr Holt and he said, well, the national market conditions are very different, what he actually meant was Visa have set different MIFs in different national markets in purported reliance upon different market conditions. But an acquirer is simply batching together transactions and feeding them through the scheme electronically and certainly with the SEPA, the Single European Payments Area in place, why on earth should the underlying costs of acquiring be significantly different whether they are Dublin, Prague, Frankfurt or Paris. There is no objective reason why the underlying costs should be any different.

The MIF rate that is set is not set by reference to the acquirers' costs in any of those markets. The MIF rate is set for commercial reasons of the scheme and so why should a Dublin acquirer not be able to say to a London merchant: we will acquire your transactions for you and we are cheaper than the London acquirer.

The suggestion that it is important for protecting competition to prevent that arbitrage opportunity just sits very ill from a European lawyer's perspective because that is how cross-border services and

cross-border goods are provided day in/day out. The constant example I gave was generics in pharmaceuticals, where countless CJEU decisions have said you cannot block generic products that are lawfully on sale in another Member State from entry simply on the basis of IP rights on a national basis; that has been the battle since the early 1980s in both EU law and EU competition law.

So I have to say I really instructed on a personal level with understanding why arbitrage was anti-competitive, it just seemed to me entirely wrong, but I am conscious that Mr Dryden on this issue did say in terms; well, it follows, because I think if you allowed everyone to have the lowest common denominator pricing model that there would be uniform rate and I cannot predict whether that would be higher or lower than the factual, therefore I am not in a position to form a view on this. We say you do not need to go to that level of abstraction because it is sufficient that the whole purpose behind the cross-border acquiring rules is to shield the domestic market from cross-border services and that is an object restriction. On the effect analysis, we say once you recognise, as one must, based on the evidence, see paragraph 114 of our note, once you recognise that there are lower MIF rates

available from -- well, from the get-go and more recently post 2015, I think there was a rate given for Liechtenstein which appears to be zero in Dr Niels' report but that may be due to lack of data, I do not know.

But the obvious one for debit is at least the fact that is known that the debit rate in Ireland is 0.1%, that produces an immediate 0.1% differential with the prevailing UK MIF rate for debit and why should not a Dublin acquirer be able to offer the 0.1% rather than the London rate of 0.2%? So the effect is obvious and the effect does not have to be an actual effect because of course the rule is stopping the actual effect, it is the prospective effect on the market of that arbitrage opportunity.

Moving on to the next issue, issue 8.4, is the essential fact basis of the *Mastercard II* decision applicable to *Mastercard Central Acquiring Rules* in the periods prior to and after 27 February 2014. The answer is yes, the same reasoning applies.

The only thing that has changed is that the European Commission for better or worse has said you are -- it is open to you to be able to charge a cross-border acquiring rate of 0.2 or 0.3 and you must offer that and you can then offer the difference between either that

rate or a domestic rate depending on whichever is lower.

What the European Commission is not insistent upon is the ability for a cross-border acquirer to access its own local domestic rate but we say that the reasoning applies equally to that, it is just they have not gone to that next level in dealing with the problem in terms of extracting the commitments or insisting upon the outcome at this stage. But that is why we are bringing this claim for the post 2015 period.

Next issue is does the decision by the Commission on 9 August 2001, which was the *Visa I* Negative Clearance decision, somehow tie everyone's hands until 2015? There is some correspondence to look at here that is confidential to Visa but I will try and do so without mentioning anything awkward.

THE PRESIDENT: Yes.

MR BEAL: The first is to look at the note of a meeting in May 2008 which is at {RC-J4/14/4}. We see there is some -- round about paragraph 2.17, 2.18 there is some issues being discussed about how things lie compared to how things used to lie. At 2.21, the initial set of initials that are referred to there represent the views of a Commission official and you can see what is said.

Next, please, {RC-J4/16/2}, a meeting in December 2008. Top of the page, the Commission makes an

observation which is to do with something else rather than what we are dealing with now. But in the next paragraph it gives a warning shot across the bows and the Tribunal can see that.

So what is in play are some other things. Then over the page, third paragraph down, again, various issues are being put in play.

So and then finally, please, page 7 on this document, {RC-J4/16/7} you can see that there is a discussion about certain things that are covered under the subheading that is halfway down the page. So the idea that the situation in *Visa I* remained the view of the Commission is not right.

The *Visa Exemption* decision then expired on 31 December 2007 and on 18 March the Commission confirmed it was opening an investigation into the EEA MIF. I have given a reference to that in paragraph 117 of my note. On 1 April 2008 the Commission confirmed it was going to initiate a new ex officio investigation into the Visa and Mastercard arrangements for the cross-border treatment of commercial cards and then a further meeting took place which we can look at it is at {RC-J4/22/21}. Sorry, that is the ex officio investigation, I think. {RC-J4/16/1}.

If we could go, please, that tells you what the

document is and what they are looking at, who the people are. If we then please look at page 2, is that the right document? It is the one we have just looked at. {RC-J4/16/1}. That is it. Yes, no -- sorry, top of page 2, the second paragraph.

The first paragraph, which is what put me off, was it seemed to be reiterating a point that had already been made but the second paragraph is where the Commission indicates what it is wanting to think about.

What next happened, as can be seen in the chronology that I have handed up, is a series of negotiations between the Commission and the Commission took place. There was a press release issued by the Commission in April 2013 saying it was going to look into inter-regional fees and related practices including the rule on cross-border acquiring. We can see that at {RC-J5/17.2/1}.

It confirms the Commission will be conducting an in-depth investigation into (ii) cross-border acquiring. Then ultimately formal commitments on the Visa cross-border acquiring rule were offered on 10 May, that is {RC-J4/44/1}, and those commitments were not initially accepted in their exact terms. They were amended and it is the amended commitments that were then accepted in the second commitments decision on

26 February 2014 so that is {RC-J5/20/1}.

It is that February 2014 decision that produced the seismic response in the domestic UK market with Barclaycard setting up a subsidiary operation in Dublin and Worldpay setting up a related operation in the Netherlands and that led to the spike in cross-border acquiring that we saw in Dr Niels' graph that began not from February 2014 because it did not come into force but from January 2015 when it did. That is our answer on issue 8.5.

On issue 8.6, the question is what is the nature and extent of the findings in this commitments decision. That simply raises the legal issue, what is the effect of the commitments decision and you have heard my submissions on that twice now, once in opening, once this morning, I do not need it dwell any further on that.

Issue 8.7 says does Visa have a defence to the claim on the basis it was required to apply its rule by the first commitments decision? The first commitments decision did not require Visa to apply any rule whatsoever. What it did is it recognised that Visa had committed to registering domestic MIFs in the domestic countries because otherwise the cross-border acquirer had no way of knowing what the domestic rate was. So

a cross-border acquirer who does not know what the domestic rate is, is not able to take advantage of that domestic rate if it is lower and might simply be in the dark as to what it is prepared to offer on a cross-border acquiring basis. That has nothing to do with the segmentation of the national market which is the true vice of the old and new cross-border acquiring rule.

Issue 8.8 raises, I am afraid, the concept of arbitrage being an anti-competitive process such that defending national segmentation is a pro-competitive response and that, I am afraid, is simply an economic theory I just cannot get my head round. I will be blunt about it, it makes no sense to me and it is certainly not lawful from a European Union competition perspective and that is all I need say about it.

Issue 8.9 raises a rather strange issue as to is it open to Mastercard to rely upon the fact that without their Central Acquiring Rule once the *Visa* commitments were in place they would have been somehow -- put it this way; Mastercard is saying we had to have our acquiring rule in place because otherwise we would have been stuck with the solution that Visa gave in their commitments. It is a rather odd submission as I understand it.

Mastercard, as the *Mastercard II* CAR decision confirms, deliberately chose not to offer commitments to the EU Commission in 2014. The reason they did that was because they thought, well, we can carry on charging high MIFs domestically in our segmented world and we will gain a competitive advantage over Mastercard for doing so. It was something I think that Visa actually then complained about to the Commission was this competitive advantage as a result of the commitments.

Of course the response from the European Commission to this was that that was an aggravating feature which was part of the reason why the penalty imposed by the *Mastercard II* CAR decision was 570 million euros. So the Commission took a very dim view frankly of this. They also took into account the fact that this was a repeat infringement because it was in the context of the operation of the MIFs and that had been the subject of the *Mastercard I* decision.

So to suggest that somehow Mastercard was obliged to carry on applying its unlawful rule because of the commitments that Visa had given is a very, very odd submission and of course if it were right Visa would be entitled to say on this reasoning: Well, we are entitled to reinstate the old rule notwithstanding our commitment because it is objectively necessary for us to

compete with Mastercard who have retained the old infringing rule. It is a very strange skewed world in which competition be damned, we are entitled to do what we want because otherwise we will lose out to the other scheme and of course therein lies part of the mischief in this case. Schemes historically have blamed each other, see the death spiral argument, to say: Well, we had to do what we were doing because it is all Visa's fault or it is all Mastercard's fault.

The attraction of these proceedings, and indeed the umbrella proceedings generally, is they cannot play each other off in that way with this Tribunal and that is very much to be welcomed.

Sir, that is a convenient moment if I may to pull stumps. I have, as you can see, five and a half pages left on the note. I do need to go through the factual findings that we invite the Tribunal to make. That is going to be done by reference to our closing submissions which have now been uploaded on to Opus and which you have a copy of, but I will done comfortably by lunchtime on Tuesday. I may be short. I have been able to go more quickly today than I had hoped, I have covered more than I had hoped and I am confident that the same will apply on Tuesday.

With a fair wind, I can therefore give my learned

friends the head start it seems they want on the time allocation front and that may cure the need for Mr Cook to seek your indulgence to go into a period of time that he has not had allocated to him by the timetable.

THE PRESIDENT: Thank you very much, Mr Beal.

We will resume at 10.30 Tuesday morning.

MR BEAL: Thank you very much.

THE PRESIDENT: Thank you very much.

(4.31 pm)

(The hearing was adjourned until 10.30 am on Tuesday 26 March 2024)